SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1061.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HARRISON C. DREW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition	1	1
Receipt of Attorney-General for copy of petition	9	4
Citation	10	5
Marshal's return	11	5
Plea to jurisdiction	12	5
Answer	15	7
Motion for rehearing of exception to jurisdiction	15	7
Finding of facts	17	7
Conclusions of law	21	9
Judgment	23	10
Minutes of the court	25	11
Leave granted to take testimony	25	11
Plea to jurisdiction fixed for hearing	25	11
Hearing of plea passed by consent	25	11
Hearing and submission	25	11
Plea to jurisdiction filed, etc.	25	11
Petition for writ of error	26	12
Citation	28	12
Proof of service of citation	29	13
Writ of error	30	13
Certificate to transcript	32	13

1 *Petition.*

To the honorable judges of the circuit court of the United States in and for the western district of Louisiana:

This petition of Harrison C. Drew, a citizen of the State of Louisiana, and residing at Lake Charles in Calcasieu Parish, in said State and in the district aforesaid, with due respect shows to your honors and to said court:

That on the 9th of July, 1788, at New Orleans, in the then Spanish province of Louisiana, Don Estevan Miro, then political and military governor under Spain, of said province (2 White's Recopilacion, 449), did give, grant, and concede to and in favor of Francisco Adante an order of survey or concession for a tract of land in said province to contain a front of thirty lineal arpents on the left descending or eastern bank of the Bayou Macon, with the ordinary depth of forty lineal arpents, or a tract of twelve hundred superficial arpents, equal to 1,015 American acres, but that said order of survey or concession was not enforced by the Government of Spain in said province, nor by the succeeding Government of France. That by the treaty between Spain and France of the 1st of October, 1800, art. 3 (8 Stats., 202), said province was ceded to France, and by the treaty between France and the United States of the 30th April, 1803, art. 1st (8th Stats., 202), the same was ceded to the United States, which nation by the 3rd article of said treaty guaranteed the inhabitants "the free enjoyment of their liberty, property, and the religion which they professed."

2 That in order to effectuate this pledge and to ascertain the land claims of the said inhabitants entitled to its benefits, the Congress of the United States on the 11th of May, 1820, passed an act (3 Stats., 573) which made it the duty of said Francisco Adante to present his claim to said land under said concession and the evidence supporting it to the register of the United States land office for the district north of Red River, in said State of Louisiana, in order that the said register might examine the same and report the same to said Congress for their final action thereon. That said Adante did so present his said claim or concession to said register, and did prove the same to his satisfaction, by virtue of which said register did on the 1st of January, 1821, make a report on said claim and on other claims of like character, as required by said law, to the Secretary of the Treasury of the said United States, which officer, on the 1st of January, 1823, sent said report to the Congress of the United States, with the recommendation that the said grant to Adante and other grants ought to be confirmed and validated by the United States. (American State Papers, Public Lands, vol. 3, p. 525, Duff Green's ed.)

That in pursuance of this report and recommendation Congress passed an act on the 28th of February, 1823 (3 Stats., 727), whose 2nd section confirmed said concession of said Francisco Adante.

3 That in said report the said claim is placed in class first and numbered 31.

And your petitioner further shows—

That by virtue of this legislation & action the said Francisco Adante had a vested right in, & became the owner of, a tract of land under the laws of the United States, & that under other laws, & the established usages of the surveying department of said United States, the same should

have been surveyed & set apart from the public domain as the exclusive private property of said Adante, & should have been the same land described & intended to be granted in the said order of survey heretofore described; but your petitioner alleges that the said United States have never fulfilled this obligation, but on the contrary have surveyed said land as public land *as public land* of the United States, and have long ago disposed of the same adversely to the said vested right said Adante, so that the same can not now be surveyed & patented to him or those holding title to the same under him.

That a large number of grants & concessions of land in the State of Louisiana & other States, confirmed by various laws of Congress, having been adversely disposed of by Congress for various reasons, either in whole or in part so that the same could not be patented to the grantees or confirmees, or their legal representatives, the Congress of the United States on the 2nd of June, 1858, passed an act (11 Stats., 294) whose 3rd section provided "that in all cases of confirmation by this act, or where
4 any private land claim has been confirmed by Congress, & the same in whole or in part has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated upon satisfactory proof that such claim has been so confirmed, & that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed & unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: Provided that such location shall conform to legal divisions & subdivisions.

SEC. 4. And be it further enacted, that the register of the proper land office upon the location of such certificate shall issue to the person entitled thereto a certificate of entry, upon which, if it shall appear to the satisfaction of the Commissioner of the General Land Office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue as in other cases."

And your petitioner further shows—

5 That said sections of said act of Congress are in full force & effect, by virtue whereof it is now the duty of the surveyor-general of Lousiana, said grant having been confirmed by Congress prior to June 2, 1858, & then & yet remaining unsatisfied & unlocated in whole and for other reason than fraud discovered therein subsequent to its confirmation, to satisfy and pay the same, as an obligation against the United States, by issuing and delivering to the said Francisco Adante or his legal representative, the certificate of location, or land scrip, provided by said law, & for an amount equal in acres to the amount of said grant, or one thousand and fifteen acres.

That this duty has never been discharged by said surveyor-general & remains a subsisting and binding duty on his part, the right to said land scrip, or certificates of location granted by said act of Congress of June 2, 1858, never having been barred under that act, nor under any other law, & never having been rejected or reported on adversely by any court, depart-

ment, or commission authorized to hear and determine the same. That said right to said indemnity certificates created by said law of 1858 thereby became a vested right in the said Francisco Adante or his legal representatives.

That the said Francisco Adante sold & conveyed his said succession & the land embraced by the same & all his rights in the premises
6 on the 11th of January, 1837, to Samuel Nelson Hite, of the city of New Orleans & State of Louisiana, by act passed before Joseph Cuvillier, a notary public in & for the State of Louisiana & parish of Orleans, who, on the 18th of March, 1840, sold & conveyed an undivided interest of three-fourths therein to Pierre Oscar Sorbé, of the same city and State, by act passed before the same notary.

That at a public judicial sale on the 18th of December, 1886, in the parish of Madison, at the suit of Wm. H. Wright vs. heirs of Samuel Nelson Hite et als., numbered 716 on the docket of the district court for the 8th judicial district in & for said parish & State of Louisiana, the said concession & claim in whole, was acquired by William H. Wright of said city of New Orleans & State aforesaid, who, on the 10th day of March, 1887, sold and conveyed the same unto your petitioner; thus constituting your petitioner the legal representative, under the laws of Louisiana, of the said Francisco Adante with respect to said grant & concession & entitling him to the certificates of location under said act of 1858 in payment for said concession so disposed of by the United States as aforesaid.

And your petitioner further shows—

That under the act of Congress approved on the 3rd of March, 1887, entitled "An act to provide for the bringing of suits against the Government of the United States," this court has jurisdiction to hear & determine this suit,

7 That the certificate of location or land scrip herein claimed, amounting as aforesaid to 1,015 acres, have a value of one dollar and twenty-five cents an acre as fixed by the said act of 1858, and that the United States have by said law agreed to receive them at that value in payment for any lands subject to private entry at that price in money; that, therefore, the value of the thing herein sued for is the sum of twelve hundred & sixty-eight dollars & seventy-five cents.

The premises considered your petitioner prays that this petition may be filed and be duly served upon the district attorney for the United States for the western district of Louisiana. Your petitioner having already served a copy of the same upon the Attorney-General of the United States, as required by section six of said last-named act of Congress, and that after due proceedings & all legal delays your petitioner do have & recover in his favor and against the United States a decree upon the facts & law, fixing the liability of the United States to your petitioner for the certificates of location aforesaid, to the amount of one thousand & fifteen acres, in full payment & satisfaction of the said concession or grant to said Francisco Adante, now the property of your petitioner as aforesaid.

And your petitioner prays for a mandate or other proper process to issue out of this honorable court, & under the seal thereof, directed to the
8 United States surveyor-general for the State of Louisiana, in New Orleans, in said State, or his successor in office, directing him to prepare & issue to your petitioner, as provided by section three of said act

of June 2, 1858, certificates of location for the amount of one thousand & fifteen acres, in full satisfaction of the said grant or concession to Francisco Adante, granted by Spain and duly confirmed by the United States as aforesaid. And your petitioner prays for all costs, & for general relief, and as in duty bound, &c., &c.

By his counsel—

(Sig.) J. L. BRADFORD,
(Sig.) A. H. LEONARD,
(") LEONARD, MARKS & BRUENN,
Of Counsel.

THE U. S. OF AMERICA,
Western District. La.:

Personally appeared before me the undersigned authority, A. H. Leonard, who being duly sworn, deposes & says that all the statements made in & allegations of the above and foregoing petition are true to the best of his knowledge & belief, & that plaintiff is absent.

(Sig.) A. H. LEONARD.

Sworn to & subscribed before me this 21st day of March, 1887.

E. J. NOLAN,
D'y Cl'k.

8½ (Endorsement:) No. 125. H. C. Drew vs. The United States. Petition. Filed March 26th, '87. E. J. Nolan, d'y cl'k.

9 *Attorney-General's receipt for copy of petition, dated April 2, '87.*

It is acknowledged that there has been this day delivered to me, under section six of an act of Congress approved March 3d, 1887, entitled "An act to provide for the bringing of suits against the Government of the United States," a certified copy or duplicate of a petition addressed to the circuit court of the United States for the western district of Louisiana, in which Harrison C. Drew, of said district, is plaintiff, & the United States defendants, the same purporting to be signed by J. L. Bradford & A. H. Leonard as counsel, & to have been sworn to by the said Leonard on the 25th March, 1887, before, & certified as a true copy by, E. J. Nolan, deputy clerk for said circuit.

(Sig.) A. H. GARLAND,
Att'y-Gen'l U. S.

APRIL 2ND, 1887.

(Endorsed:) No. 125. Circuit court, west. dist. La. H. C. Drew vs. United States. Att'y-Gen'l's receipt for copy of petition, dated April 2nd, 1887.

10 *Copy of citation.*

Circuit court of the United States, fifth circuit, western district of Louisiana.

THE UNITED STATES OF AMERICA,
Western District of Louisiana:

H. C. DREW
vs.
THE UNITED STATES. } No. 125.

To the United States:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same, in the office of the clerk of the circuit court of the United States, fifth circuit, and western district of Louisiana, in the city of Opelousas, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from Opelousas, the place where the court is held.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of Shreveport, this 26th day of M'ch, A. D. one thousand eight hundred & eighty-seven, and of the Independence of the United States of America the 111th year.

Teste:

E. J. NOLAN,
D'y Clerk.

11 *Marshal's return.*

Rec'd in of M'ch. 27, 1887, & on the April 1st, 1887, I served a certified copy of this citation & certified copy of petition thereto attached on M. S. Jones, attorney for the United States for the western district of Louisiana. This service was made in Shreveport, La., & by leaving same in the hands of said dist. attorney—200 miles from Opelousas, La.

(Sig.) P. B. WEAKS,
D'y Marshal.

(Endorsement:) No. 125. United States circuit court, fifth circuit, western district of Louisiana. H. C. Drew vs. The United States. Copy of petition and citation inside to be served on M. S. Jones, U. S. att'y western district of La. Marshal's return. Filed April 6th, '87. E. J. Nolan, d'y cl'k.

12 *Plea to the jurisdiction of the court.*

U. S. circuit court, 5th circuit & western district of Louisiana.

H. C. DREW
vs.
THE UNITED STATES. } No. 125.

The United States, defendants in the above cause, appear by Montfort S. Jones, United States attorney for the western district of Louisiana,

and, reserving all rights to answer further, plead to the jurisdiction of the court in this cause, on the following grounds, to wit:

1. The cause of action disclosed in this petition is such as this court has no jurisdiction to determine under the provisions of the act of Congress of March 3rd, 1887, entitled "An act to provide for the bringing of suits against the Government of the United States," under which act this suit was brought; which said act confers on this court a concurrent jurisdiction with the Court of Claims only, & as to the matters named in section first of said act. The Court of Claims having no jurisdiction over this cause, this court has none.

2. The jurisdiction of the Court of Claims is confined to "money demands against the Government of the United States," and the jurisdiction of that court and this being concurrent, this court is without jurisdiction in this case.

3. The petition discloses that plaintiff's claim grows out of and
13 is dependant on the treaty between France and the United States of the 20th of April, 1803, and, hence, under the provisions of section 1066 of the Revised Statutes of the United States this court is without jurisdiction to hear and determine same.

4. The cause of action set up in the petition in this suit accrued in the year A. D. 1858, and more than six years before the institution of this action, and the jurisdiction of this court in such claims is debarred by section 1, paragraph 2nd, of said act of March 3rd, 1887, & by said provision this court has never had jurisdiction of this cause on the face of the petition

5th. Defendants further except, that, under the act of 2nd of June, 1858 (11 Stats., 294), it is made the duty of the Commissioner of the General Land Office to pass upon plaintiff's claim, and said Commissioner alone is authorized to determine the validity thereof upon "satisfactory proof" to be administered before him; that the decision of said Commissioner is final, & this court is without jurisdiction to review his action thereon.

6. The claim of plaintiffs has been heretofore presented to the Department of the Interior and has been ruled on and rejected by said Department under the authority conferred by said act of June 2nd, 1888, and, hence, this court is without jurisdiction to hear and determine said claim, under the provisions of the act of 3rd of March, 1887, section 1, paragraph 1; and since the allegation of plaintiff's petition to the
14 contrary affects the jurisdiction of this court, said averments are traversible and can be shown to be untrue.

7. This suit is of the nature of a mandamus directed against the surveyor-general of Louisiana, whose official domicil is in the eastern district of Louisiana, and outside of and beyond the jurisdiction of this court.

Wherefore defendants plead to the jurisdiction of this court to hear and determine plaintiff's suit, and pray that same be dismissed at his costs.

Defendants further pray for all orders in the premises, for costs & general relief, & in the event that these exceptions be overruled that their right to answer further be reserved.

(Sig.) MONTFORT S. JONES,
U. S. Att'y,

(Sig.) C. MAYO, *Dp.*

Filed Jan. 9th, 1888.

(Endorsement:) No. 125. U. S. circuit court. H. C. Drew vs. The United States. Plea to the jurisdiction of the court. Filed Jan. 9th, 1888. (Sig.) C. Mayo, dp.

15 *Answer.*

Ct. ct., 5th circuit, western dist. La.

H. C. DREW
vs.
UNITED STATES. } No. 125.

The United States appear by counsel, the U. S. attorney for the western district of Louisiana, and deny all and singular the allegations of plaintiff's petition & require strict proof.

Wherefore they pray for hence dismissed, for costs & general relief.

(Sig.) MONTFORT S. JONES,
U. S. Att'y.

Filed Jan. 19th, 1888. (Sig.) C. Mayo, dp. cl'k.

(Endorsement:) No. 125. U. S. circ't ct. H. C. Drew vs. United States. Answer. Filed Jan. 19th, 1888. (Sig.) C. Mayo, dp. cl'k.

Motion for rehearing of exception to the jurisdiction.

Circuit court, 5th circuit & western dist. of Louisiana.

H. C. DREW
vs.
UNITED STATES. } No. 125.

Defendants appear by counsel & move the court for a rehearing
16 of exception to the jurisdiction of the court, & pray that the ruling of the court rejecting same be reconsidered, & that this suit be dismissed at plaintiff's costs, for the reasons set up in the original exception.

(Sig.) MONTFORT S. JONES,
U. S. Att'y.

Filed Feb'y 27th, 1888. (Sig.) J. B. Beattie, d'y cl'k.

(Endorsement:) No. 125. C. C. H. C. Drew vs. United States. Motion for rehearing of exception to the jurisdiction. Filed Feb'y 27th, 1888. (Sig.) J. B. Beattie, d'y cl'k.

17 *Finding of facts, conclusions of law & judgment on same.*

United States circuit court for the 5th circuit and western district of Louisiana, June term, 1888, Opelousas.

HARRISON C. DREW.
vs.
THE UNITED STATES. } No. 125.

This cause came up to be heard at the January term, 1888, of this court, at Opelousas, on the petition of the plaintiff, the exceptions to the juris-

diction, the answer of the United States, and the evidence, and was argued by counsel, and was then taken under advisement by the court.

And the court having fully considered the same, and the exceptions of the United States to the jurisdiction having been by consent referred to the merits, the court will now render judgment not only on the issues presented by the exceptions but on the merits, as presented by the petition and answer, and sustained by the evidence.

This suit arrises under the act of Congress entitled, "An act to provide for bringing suits against the Government of the United States," approved March 3rd, 1887, and is brought by the owner of a confirmed but unsatisfied private land claim against the United States, to obtain a judgment of a judicial tribunal on the law and facts affecting his rights, and directing the United States surveyor-general for Louisiana to satisfy the
18 same by issuing to the petitioner certificates of location, or land scrip, as he is required to do in such cases under the general law as contained in sec. 3 of the act of Congress of June 2nd, 1858.

The court, as required by section 7 of the act under which the suit was brought, finds the following facts from the evidence in the cause:

1st. That on the 9th of July, 1788, the competent Spanish authority in the province of Louisiana granted to one Francisco Adante an order of survey or inchoate title for a tract of land to front 30 arpens on the eastern or left bank of the Bayou Macon, with the depth of 40 arpens, or a superficial quantity of 1,200 arpens, equal to 1,015 American acres. That said land was never surveyed by Spain, or France, or the United States, and the claim thereto was consequently an unlocated claim, on the 2nd June, 1858, and is yet unlocated by lawful survey. That if property located by survey it would be contiguous to and immediately below the claim of Juan Mansol, No. 10 of Sutton's Reports of Jan. 1st, 1821, being sec. 37, in township 18 north, range 10 east, in the present parish of Madison, and would extend down stream below said Mansol claim, with a front on said stream of 30 arpens, and a depth of 40 arpens. And that the land that would be thus covered by said Adante claim, has, be-
19 fore the institution of this suit, and before June 2nd, 1858, been disposed of by the United States adversely to the rights of the said Francisco Adante and those claiming the same under him, and can not now be patented to said Adante, or to them.

2nd. That said Adante, in pursuance of the act of Congress of May 11th, 1820, presented his claim, with the evidence in support of it, to the register for the land district north of Red River, in due time. That it was reported by said *said* register to Congress, and recommended by him for confirmation, as claim No. 31, class 1st, in his report dated January 1st, 1821, and was confirmed accordingly by Congress by an act passed on the 28th of February, 1823. That said Francisco Adante sold and conveyed his right to said land and said concession on the 11th January, 1837, to Samuel N. Hite. That said Hite sold and conveyed an undivided interest of three-fourths in the same, on the 18th March, 1840, to Pierre O. Sorbé. That the entire tract of land, and the claim of said Adante to the same, was subsequently, on the 18th December, 1886, sold at a public judicial sale in the parish of Madison, to effect a partition in the suit of Wm. H. Wright vs. The heirs of S. N. Hite and others, being No. 716 of the docket of district court in and for said parish, and was acquired

by the plaintiff, the said Wm. H. Wright. That said Wright sold and conveyed his right thus acquired, on the 10th March, 1887, to
20 Harrison C. Drew, the petitioner in the present suit.

No. 3rd. 4th. That while the said P. O. Sorbe owned the said undivided interest of $\frac{3}{4}$ths in said claim, he applied to the U. S. surveyor-general of Louisiana for certificates or scrip under sec. 3 of the act of June 2nd, 1858, in satisfaction of said interest, and the said surveyor-general issued the same on the 12th October, 1871, to wit: for the quantity of $761\frac{25}{100}$ acres, and sent the same to the Commissioner of the General Land Office for approval.

5th. That on the 2nd July, 1872, said Commissioner returned said scrip to the surveyor-general with' his approval, on the ground, as alleged by him, that it was unlawful to issue scrip on any claim for less than the whole amount due thereon.

6th. That it does not appear that the right to relief of the said Adante, or his legal representatives under the act of 1858, has ever been rejected or reported on adversely by any court, department, or commission authorized to hear and determine such right.

7th. And finally, that the present suit was filed and the petition served, as required by the act of March 3rd, 1887, during the month of March, 1887.

Upon the foregoing facts and others established by the evidence, but not deemed necessary to be stated, the court, after mature exami-
21 nation and reflection, has arrived at the following conclusions of law:

1st. That the petitioner has shown himself entitled to receive, under the law of 1858, from the surveyor-general, certificates of location for the amount of 1,015 acres, locatable according to the provisions of said act and of the amendatory and enlarging act of January 28th, 1879, in full payment and satisfaction of the grant to said Adante, made by Spain and confirmed by the United States, of which grant he has shown himself to be the true and lawful owner under the laws of Louisiana.

2nd. That said petitioner, having proved that the said Adante claim was a private land claim, and had been confirmed by Congress prior to the act of June 2nd, 1858, and that it then remained wholly unsatisfied for other reasons than a discovery of fraud after confirmation, it became the duty of the surveyor-general to grant, and his right to receive, the indemnity scrip provided by sec. 3 of said act of 1858.

3rd. That the general field of jurisdiction expressed by sec. 1 of the act of 1887 does not exclu'e the idea of a demand of this nature, while the language of sec. 5 clearly embraces it, as one of a large mass of purely judicial questions it was the policy of the act to remove from the
22 Executive Departments and submit to the decisions of the regular judicial tribunals.

4th. That before the passage of the act under which this suit is brought there was no other law under which it could have been prosecuted, and hence the right of Adante and his assigns, founded on the legislation mentioned, including the act of 1858, was not a suable right, and could not have been put *it* suit at an earlier day.

5th. That the bar of the 1st section, 2nd proviso, must be construed, in view of the express bar against war claims, all of which accrued more

than six years before the date of the act, to embrace only claims arising more than six years before the act and on which, under general or special laws, suit might have been brought against the Government.

6th. That as it is not contended that the right of Adante and his representatives could have been put in suit before the passage of the present act, and as it has been put in suit under it within less than six years from its date, and had never been barred or limited under the act of 1858, or other laws, and is yet a subsisting right, it follows that the court has jurisdiction to hear and determine it, and of course to render judgment according to the merits, which, if in favor of the petitioner and against the Government, may be enforced by process adapted to the nature of the case.

7th. That the failure of the petitioner to prosecute his rights,
23 under the act of 1858, before the executive officers, can not bar the present suit under the 1st proviso of sec. 1, because by its very terms had such prosecution resulted unfavorably, the adverse decision would have barred the suit, and the favorable one would have left the petitioner nothing to sue for.

8th. The jurisdiction to hear and determine the present suit seems, therefore, reasonably clear, and as a consequence the exceptions to the jurisdiction relied on by the Government must be overruled and the case disposed of on its merits.

It is therefore ordered, adjudged, and decreed that Harrison C. Drew have judgment against the United States for certificates of location or land scrip for the quantity of one thousand and fifteen acres, the equivalent of twelve superficial arpens, in full satisfaction of the grant by Spain to Francisco Adante for said quantity confirmed by the United States, and still unlocated and unsatisfied, to be issued by the United States surveyor-general for the State of Louisiana, or his successor in office, according to the form and in the mode prescribed by sec. 3 of the act of June 2nd, 1858, entitled "An act to provide for the location of certained confirmed private land claims in the State of Missouri, and for other purposes," and the act of January 28th, 1879, entitled "An act defining the man-
24 ner in which certain land scrip may be assigned and located or applied by actual settlers, and providing for the issue of patents in the name of the locator, or his legal representatives," and that after said certificates are so prepared and issued they be assignable, locatable, and patentable according to the provisions of said acts.

It is further ordered, adjudged, and decreed that the petitioner do have and recover from the United States such costs as are provided for in sec. 15 of the act of 1887 by him incurred since the filing of the exceptions by the same, to be taxed and ascertained as in other case.

Judgment rendered and signed at Opelousas, in open court, this 9th day of June, A. D. 1888.

(Sig.) ALECK BOARMAN, *Judge.*

A true copy.

(Sig.) C. MAYO,
Dep. Clk U. S. Courts.

(Endorsement:) U. S. circuit court, west. dist. La. No. 125. H. C. Drew vs. United States. Finding of facts, conclusions of law, & judgment on same. Filed June 9th, '88. E. J. Nolan, d'y cl'k.

25 *Minutes of the court.*

FRIDAY, *July 29th*, 1887.

Shreveport term.
Court met pursuant to adjournment.

H. C. DREW
vs.
THE UNITED STATES. } No. 125.

Leave granted to take testimony in and out of the State.

MONDAY, *January 9th*, 1888.

Opelousas term.
Court met pursuant to adjournment.

H. C. DREW
vs.
UNITED STATES. } No. 125.

Plea to the jurisdiction of the court filed & fixed for a hearing to-morrow.

TUESDAY, *January 10th*, 1888.

Opelousas term.

H. C. DREW
vs.
UNITED STATES. } No. 125.

Argument on plea to the jurisdiction of court passed over by consent.

THURSDAY, *January 19th*, 1888.

H. C. DREW
vs.
UNITED STATES. } No. 125.

Plea to jurisdiction of the court argued and answer filed, & case taken under advisement on exception & merits.

MONDAY, *February 27th*, 1888.

Shreveport term.

H. C. DREW
vs.
THE UNITED STATES. } No. 125.

Plea to jurisdiction overruled. Motion for re-hearing to jurisdiction filed.

26 *Petition for writ of error.*

UNITED STATES OF AMERICA,
Fifth Circuit and Western District of Louisiana:

To the honorable justices of the Supreme Court of the United States:

And now come the United States, defendants, by their Attorney-General, and complain that in the records and proceedings, and also in the rendition of judgment in a suit between H. C. Drew, plaintiff, and the United States, defendants, tried in the circuit court of the United States for the fifth circuit and the western district of Louisiana, at the June term thereof, A. D. eighteen hundred and eighty-eight, at Opelousas, Louisiana, and in which judgment was rendered against them on the fourth day of June, A. D. eighteen hundred and eighty-eight, manifest error hath intervened, to the great damage of said defendants, the United States.

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

A. H. GARLAND,
Att'y Gen. U. S.,
By MONTFORT J. JONES,
U. S. Att'y, Wn. Dist. La.

Allowed.
ALECK BOARMAN,
Judge.

27 (Indorsed:) No. 125. U. S. circuit court, fifth circuit, western district of Louisiana. Harrison C. Drew vs. the United States. Petition for writ of error. Filed June 30th, 1888. E. J. Nolan, d'y cl'k.

28 THE UNITED STATES OF AMERICA.

Circuit court of the United States, western district of Louisiana.

The President of the United States to Harrison C. Drew, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana, wherein the United States of America are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said United States of America as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

DON A. PARDEE,
Judge.

29 *Service of citation accepted.*

Service of this citation is hereby accepted & all delays waived this July 7th, 1888.

HARRISON C. DREW,
By J. L. BRADFORD,
Of Counsel.

(Indorsed:) United States circuit court, western district of Louisiana, No. 125. United States of America, plaintiffs in error, vs. Harrison C. Drew, defendant in error. Citation. Marshal's return. Filed July 21st, '88. E. J. Nolan, d'y cl'k.

30 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judge of the circuit court of the United States for the fifth circuit and western district of Louisiana, greeting:

Because that in the records and process and also in the rendering of the judgment in a suit before you, or some of you, between the United States, plaintiffs in error, and Harrison C. Drew, a citizen of the State of Louisiana, defendant, a manifest error has intervened to the great damage of the said plaintiffs in error, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the second Monday of October next, at Washington, D. C., being the present seat of the National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court aforesaid, at Washington, this 30th day of June, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

J. W. WHEATON, *Clerk.*

31 (Indorsed:) No. 125. U. S. circuit court, fifth circuit and western district of Louisana. Harrison C. Drew vs. The United States. Writ of error. Filed June 30th, '88. E. J. Nolan, d'y cl'k.

32 In circuit court.

THE UNITED OF AMERICA,
5th Circuit, Western District of Louisiana:

I, John W. Wheaton, clerk of the United States circuit and district courts, 5th circuit & western district of Louisiana, hereby certify that the above and foregoing twenty-eight (63 fol's) pages, from 1 to 26 inclu-

sive, contain a true, faithful, & complete transcript of all documents filed, orders made, proceedings had, & evidence in case No. 125, H. C. Drew vs. The United States, on the docket of said court.

Given under my hand and seal of office this the 14th day of July, A. D. 1888.

[SEAL.] J. W. WHEATON, *Clerk.*

THE UNITED STATES OF AMERICA,
5th Circuit, Western District of Louisiana:

I, Aleck Boarman, judge of the circuit and district courts, 5th circuit and western district of Louisiana, held in and for the western district of Louisiana, the same being a court of record, do hereby certify that John W. Wheaton, whose genuine official signature and seal are affixed to the foregoing certificate, is, and was at the time he signed the same, the clerk of said United States circuit and district courts, duly commissioned and qualified.

33 I further certify that the foregoing attestation of the said clerk is in due form and by the proper officer, and is entitled to full faith and credit.

This done & signed in open court this the 14th day of July, A. D. 1888.

ALECK BOARMAN, *Judge.*

UNITED STATES OF AMERICA,
5th Circuit, Western District of Louisiana:

I, John W. Wheaton, clerk of the United States circuit and district courts, 5th circuit and western district of Louisiana, do hereby certify that Hon. Aleck Boarman, whose genuine signature is signed to the foregoing certificate, is, and was at the time he signed said certificate, judge of the circuit and district courts of the United States for the 5th circuit and western district of Louisiana, duly commissioned and qualified.

Witness my hand and the seal of the said court this the 14th day of July, A. D. 1888.

[SEAL.] J. W. WHEATON, *Clerk.*

(Indorsement on cover:) No. 1061. The United States, plaintiff in error, vs. Harrison C. Drew. W. Louisiana C. C. U. S. Filed August 17, 1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

THE UNITED STATES, Appellant,
vs.
CARRIE JONES. } No. 1103.

THE UNITED STATES, Appellant,
vs.
HENRY TAUBENHEIMER. } No. 1102.

THE UNITED STATES, Appellant,
vs.
JAMES B. MONTGOMERY. } No. 1482.

THE UNITED STATES, Appellant,
vs.
HARRISON C. DREW. } No. 1061.

STATEMENT.

These suits were brought in the Circuit Courts of the United States against the Government to enforce in all, with one exception, a specific performance of a contract of sale of land made by it with certain private parties. These private parties have executed their part of these contracts, having performed the conditions and paid the purchase-money to the vendor, the United States, and hold the acknowledgment of such

execution, including the payment and receipt of the price demanded, given by the vendor, which vendor now refuses complete execution of its part of these contracts, and withholds from the vendees their muniments of title. The cases are before this court on appeal.

BRIEF.

The equitable right to the land has been in the vendees since they met in full their obligations to the United States under their contracts. The remedy, however, has never existed until provided by the act of March 3d, 1887, entitled "An Act to provide for bringing suits against the Government of the United States," the terms of which vest in the United States Court of Claims, the United States Circuit Courts, and the United States District Courts, *equity* jurisdiction of such suits, and such sections as are pertinent to the consideration of the matter now before the court, are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable:

Provided, however, That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which have heretofore been rejected, or reported on

adversely by any court, department, or commission authorized to hear and determine the cause.

Second. All set-offs, counter claims, claims for damages, either liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any claimant against the Government in said courts: *Provided*, That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit court of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars, and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

SEC. 3. That whenever any person shall present his petition to the Court of Claims, alleging that he is, or has been, indebted to the United States, as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he, or the person he represents, has applied to the proper Department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said accounts, still remain unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said Department and to the Attorney-General of the United States, proceed to hear the

parties and to ascertain the amount, if any, due the United States on said account. The Attorney-General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due shall be binding and conclusive upon the parties. The payment of such amount, so found due by the court, shall discharge the obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said Court. Unless suit shall be brought within said time such claim, and the claim or the original indebtedness, shall be forever barred.

SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable, and not inconsistent with the provisions of this act, and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law.

SEC. 16. That all laws and parts of laws inconsistent with this act are hereby repealed."

It will be seen that the United States Circuit and District Courts are given concurrent jurisdiction with the

Court of Claims, and, therefore, have the power to hear and determine "*all* claims founded * * * upon *any* contract, expressed or implied, with the Government of the United States," &c. The causes of action on which these suits are brought are "claims founded upon contracts with the Government of the United States."

The Word "Claim."

The Government has based its *claim* that the courts have no jurisdiction largely on the ground that the word "*claim*" signifies and embraces only such causes of action had against the Government as can be adequately adjudicated by the rendition of a money judgment; that is to say, that it is a right to demand money and nothing more.

Etymologically considered, *claim* derives its origin from the Latin verb *clamo*, which, translated, means to cry out, to shout, to exclaim. Its ordinary and universally-accepted meaning by English-speaking people, as given in Worcester's Dictionary, is "a demand as of right; a challenge of ownership;" and, as an example, is given—"as to lay claim to anything." It is further defined to mean, in the same work, "a title to a privilege in the hands of another; right; pretension; desert;" and there is another exemplification in a quotation from Locke: "Every father of a family had as good a *claim* to royalty as these." It is an extravagance of time to descant upon the scope of the application of this word. It is as broad as the knowledge of man, and the subject-matter to which it extends is limited only by the definitions of the universe.

In law its usage is but little narrowed. Bouvier defines it as "a challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant," and cites Plowd., 5, 359; 1 Dall., Penn., 444; 12 Serg.

& R., Penn., 179. As an example, he quotes from 2 Conkling, Adm., 201–210, as follows: "The owner of property proceeded against in admiralty by a suit *in rem* must present a *claim* to such property," &c. And again: "The assertion of a liability to the party making it to do some service or pay a sum of money," and cites 16 Pet., 539. And again: "The possession of a settler upon the wild lands of the Government of the United States; the lands which such a settler holds possession of." What this word has been defined to mean in the construction of any law prior to this of March 3d, 1887, in which it has been used, we have now nothing to do. The act of March 3d, 1887, repeals all laws and parts of laws inconsistent with it. We have shown very clearly the meaning of the word *per se*. If it has been held to mean a right to demand money and nothing else, then the clear intention of the legislature must have imposed this narrow and restricted application. The act, however, must show plainly the peculiar meaning to be given any word if it is intended that it shall be used in an unaccustomed sense, otherwise the well-established rule must be followed, that the ordinary and generally accepted meaning of words shall be given them in interpreting public laws.

Maillard *v.* Lawrence, 16 How., 251.

In the act of March 3d, 1887, the Circuit Court is given jurisdiction of "all claims," &c. In the act itself it is very manifest that Congress intended to increase the jurisdiction of the courts, and thereby to give the citizen a remedy against the United States in cases where, before its passage, he could have none. It is equally clear that he had, before this act was passed, an adequate remedy at law for almost, if not quite, all demands for money made against the Government.

It will hardly do to say that Congress vested these

courts with equity jurisdiction with the purpose that it should not be exercised over those cases to which the relief granted by equity is peculiarly and specially adapted, and which a court of law cannot give, but that it should be restricted to those cases in all of which a court of law can completely protect the rights of both parties —namely, money demands; and this proposition appears particularly untenable in view of section 3, which takes away the adjustment of accounts from the action of this general equity jurisdiction, one matter of money on which it could have acted, and provides for it by a special clause.

The legislative will, therefore, has been to increase the classes of cases in which the United States may be sued, not restrict them; and, as far as the *intention* of the Congress is expressed, it gives to these words, "all claims," their ordinary and generally-accepted meaning. We do not, however, have to rely on the generous intention of Congress, or on the definition implied by the equity jurisdiction, or on the fact that there is no legislative declaration in this or any other act that any peculiar and uncommon meaning shall be given to it, to learn conclusively what the meaning of this word, "*claim*," as used in this act, is and what it is not. It is defined in the act itself in particularly lucid and unambiguous language. Section 5 provides that the plaintiff in a suit brought under it shall file a petition, and that "such petition shall set forth the full name and residence of the plaintiff, the *nature* of his claim and a succinct statement of the facts upon which the claim is based, the *money or any other thing claimed, or the damages sought to be recovered,* and praying the court for a judgment or decree upon the facts and law."

Congress here directs, not that the claimant shall petition for his claim, not that he shall petition for his money, but that he shall petition for his MONEY OR ANY OTHER THING CLAIMED, which is without limit, and forcibly

suggests the ordinary and generally-accepted definition of the word "*claim*."

In conclusion, on this point we call attention to a fact well known to this court, *viz.*, that in the General Land Office every right to land secured by the entryman until issue of patent is designated and known as a "*claim*," as, for instance, pre-emption *claim*.

Further contention on this point we think unnecessary.

Equity Jurisdiction.

It will not, we presume, be questioned that the Court of Claims and the Circuit and District Courts are given full equity jurisdiction of "all claims * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." Lest such question should be raised, we quote from section 7: "If the suit be in *equity* or *admiralty*, the court shall proceed with the same *according* to the *rules of such courts*."

Exclusive Jurisdiction in the Executive Department.

Exclusive jurisdiction, after the equity title vests in the vendee, does not rest in the Executive Department. This, as has been said, is a matter of contract, the United States having agreed to sell its land and the entryman having agreed to buy, a valuable consideration flowing to both parties. Even where money does not pass, the necessary cultivation of the undeveloped West by the pioneer is a valuable consideration to the United States. It is a doctrine too firmly established by repeated enunciation by this court to need more attention than mere statement, that when the United States descends to a commercial plane and engages in matters of contract

with private parties, it waives, to this extent at least, its sovereignty, incurs the same responsibilities and acquires the same rights—in short, is controlled by the same rules that control the citizen, and there is an equality of right between them.

In the case of the United States *v.* Samuel Smoot, (15 Wall., 36–51,) appealed from the Court of Claims, where Smoot sued the Government for breach of contract, this court, by Mr. Justice Miller, said:

"This court will not apply to contracts made by the Government, nor give to its action under such contracts, a construction and an effect different from those which courts of justice apply to contracts between individuals."

In Cook *v.* United States, 1 Otto, 389–405, Mr. Chief Justice Waite, in giving the opinion of the court, says:

"It was conceded in the argument that when the United States become parties to commercial paper they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court."

In Chi. & N. W. R. Co. *v.* U. S., 104, U. S. 680, appealed from the Court of Claims, the company brought suit against the Government for breach of contract in the matter of mail service. In its opinion, by Mr. Justice Matthews, the court says:

"The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid and *binding* on the *United States* as well as upon the railroad company. They contained within themselves a mode of lessening, or, if deemed best, for discontinuing entirely the described service, and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed except by the *mutual assent of the parties.* Any change attempted by *either* otherwise would have been merely a breach of the agreement, and the *United States would have been liable*

And further on—

"It is said, the fee is not in the purchaser but in the United States until the patent shall be issued. This is so, technically, at law but not in equity.

"The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty."

Under the operation of this contract of sale, after the performance of the conditions and the payment of the purchase-money, that is to say, after the purchaser has done all he has to do, he has acquired a vested right in the property, such as he would have acquired had he been dealing with a private party, of which vested right he cannot be divested except by due process of law.

In this proposition, which, however, can hardly be questioned, we are again fully supported by numerous opinions of this honorable court.

We cite the case of Frisbie *v.* Whitney, 9 Wall., 187. The court states the case:

"Frisbie having become possessor of the legal title to the land in controversey, the complainant, Whitney, claims that he shall be compelled to convey to him because he has the superior equity."

Frisbie being the first *bona-fide* settler on the land, Whitney subsequently made a forcible entry, Frisbie expostulating with a double-barrelled shot-gun.

The Government never recognized any right in him, and in course of time issued the patent to Frisbie. In its opinion the court, while holding that mere occupancy of public land vests no right in the occupier as against the Government, says:

"A series of cases decided in this court in which the equitable rights of persons claiming under those laws have been protected by the court against the legal title acquired by other parties through the disregard of their

rights by the officers of the Land Department, is supposed to assert principles inconsistent with the construction just stated; we cannot here examine these cases in detail, but we may state that in nearly all of them it will be found that the party whose equitable title was thus protected *had, by the action of the officers of the Land Department,* and the *payment and acceptance of the price, acquired a vested right,* which these officers disregarded in violation of law."

In Hutchings *v.* Low, (15 Wall., 88,) which reaffirms the doctrine in the above case as to the failure to acquire right by mere occupancy, the court, through Mr. Justice Field, supports the proposition just laid down by us, fully, saying "that the power of regulation and disposition conferred upon Congress by the Constitution only *ceases when all the preliminary acts* prescribed by those laws for the acquisition of the title, including *the payment of the price of the land,* have been performed by the settler. When these prerequisites have been complied with, the settler for the first time *acquires a vested interest* in the premises occupied by him, *of which he cannot be subsequently deprived.*"

In reference to the same class of cases Mr. Attorney-General Speed (11 Opinions, 462) held the same views:

"It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the Government. * * * The land continues subject to the absolute disposing power of Congress *until the settler has made the required proof of settlement and improvement and has paid the requisite purchase-money.*"

Sheply *v.* Cowan, 1 Otto, 339.
Wirth *v.* Branson, 8 Otto, 118–122.

Such are the rights of the citizen under this particular contract of sale.

Let us now see whether the jealous care exercised by

the makers of our organic law to protect such rights has failed of its purpose, and, whether the Government, through its executive officers, can ignore, trample upon, and destroy the rights of private parties.

Congress is vested by the Constitution with the power of making "all needful rules and regulations" for the sale and disposition of the public lands, and in pursuance of such power it has vested in an executive department the immediate supervision over their sale and disposal, in accordance with the rules which it has prescribed. The authority given by Congress is provided by section 441, Rev. Stats., and is as follows:

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

First. * * *

Second. The public lands, including mines."

Section 453 provides that:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land and the issuing of patents for all (*agents*) (grants) of land under the authority of the Government."

Section 394, Rev. Stats., 9th clause, provides that the Postmaster-General shall "superintend generally the business of the department, and execute all laws relative to the postal service."

We fail to see the slightest difference in the character and amount of power given to these two executive officers. They are both directed by Congress to carry out the law pertaining to their respective Departments. It will hardly be contended that the Post-Office Department, if, in the execution of the duties imposed upon it, it should

deprive a citizen of a vested right under a contract, could shield the Government, if suable, under the plea of exclusive jurisdiction of the particular matter. We have quoted above from Chicago and Northwestern Railroad Company *v.* United States, in which the Government was sued for breach of contract by the Post-Office Department and judgment was rendered against it. The court says on this point:

"Of course, if it was not the intention of the acts of Congress referred to to affect the contracts of the appellant, the erroneous interpretation of them by the Postmaster General and his action under it cannot give to them any different effect, for the rights of the parties depend on the law itself."

The fact that suits have been brought and recoveries had, against the Government for similar action in matters of contract, by the other Executive Departments, applies the same principle to all.

The rights of parties to land are equally defined by, and dependent on, the law itself.

If there is any sovereign power given to this particular executive department, and withheld from other departments, to take away from citizens vested rights without exposing the Government to liability therefor, we know not whence it comes. Congress has no such power in itself, and all the powers which this department can exercise in this matter are prescribed by it. The act of sovereignty which the Government can exercise in this connection, is to declare whether it shall be sued or not, and this act it has exercised.

Exclusive jurisdiction means the sole power to "hear and determine a cause." (Bouvier.) To determine means to bring to an end, to render a final judgment where there is no appeal. This court has never acknowledged this power to render a final judgment in these cases, where private parties have been deprived of vested

rights, but, on the contrary, in many cases which have come before it, has decreed the holder of a patent issued subsequently to the vesting of the equitable title in another party, trustee for such party, of the legal title, on the ground that the Land Office had no power to rescind the contract and deprive the equitable owner of the land.

To this effect are the decisions in—

Garland *v.* Wynn, 20 How., 6.
Lindsey *v.* Hawes, 2 Black, 554.
Hunt *v.* Wickliff, 2 Pet., 201.
Stark *v.* Starr, 6 Wall., 402.

There are many such cases; but enough have been cited to show that where vested rights of private parties have been taken away by a decision of the Interior Department that Department has not "exclusive jurisdiction," for its decisions are passed upon and reversed.

We are well aware of those cases where this court has refused to interfere with the officers of the Land Department by writ of *mandamus* or injunction on the ground that the Department had discretionary power in the premises, and that the duty to be performed was not purely ministerial.

It is difficult to question some discretion in the issuance of a patent.

It is a discretion which exists in every individual vendor, who, upon becoming cognizant of fraud in the vendee, or, if he considers that the vendee fails to perform his part of the contract, can stop or go on with his own part of the contract at his election. To hold otherwise would be to force the vendor to complete execution, delivery of the thing contracted to be sold, whether real estate or personal property, notwithstanding that the vendee had not complied with the terms of the agreement in any particular, though they might demand of him the per-

formance of conditions precedent, or that he refused to pay the purchase-money, or that open, glaring, and flagrant fraud characterized his every act; thus compelling the vendor to give up the possession with all its advantages, to incur the risk of intervening rights of third parties, and to take the aggressive instead of the defensive in the subsequent litigation. The remedy against the unjust exercise of this discretion is suit by the vendee for damages in law and for specific performance in equity. He can lose by it none of his rights. It is but the discharge by the seller of the duty of self protection. We need look no further for the discretionary power vested in the Executive. The United States and the citizen stand on the same level in matters of contract, and while they have the same responsibilities and obligations, they have also the same privileges. The need of equity jurisdiction for these land cases has been appreciated for a long time past. This necessity was forcibly called attention to by this court in McClung *v.* Silliman, 6 Wheat., 605: and in the case of Bonner *v.* United States, 9 Wall., 156, where the plaintiff, who held a military land warrant, brought suit for the value of land which had been ceded to him, but which the Government had subsequently disposed of in another way, this court is clearly of the opinion that contracts for the sale of public lands would be corrected and reformed if the United States were but suable in equity. The following is quoted from its opinion:

"If this position (the claimant's) be correct, this claim is based on the theory that the United States has violated the trust contained in the deed of cession of the Northwestern Territory, and is bound in good conscience to furnish compensation to the beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity, and if it were a controversy between two private suitors it would have to be settled there, for a court of law could not afford the proper mode and meas-

ure of relief. * * As the Government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations it follows that the remedy of the claimant, if any now exists, is with Congress."

Of course this opinion was given long before the passage of the act of March 3d, 1887.

The question of expediency cannot, with propriety, be considered. If the equity jurisdiction is vested in the courts it was undoubtedly the intention of Congress that it should be there, and if its exercise is not beneficial it can be taken away. Private rights are sacred.

Respectfully submitted.

JONES & VOORHEES.
JOHN PAUL JONES,
By permission of the Court.

CHAP. CXXII.—*An act to establish a Court for the Investigation of Claims against the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behaviour; and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. Each of the said judges shall receive a compensation of four thousand dollars per annum, payable quarterly, from the treasury of the United States, and shall take an oath to support the Constitution of the United States and discharge faithfully the duties of his office.

SEC. 2. *And be it further enacted*, That a solicitor for the United States, to represent the government before said court, shall be appointed by the President, by and with the advice and consent of the Senate. It shall be the duty of said solicitor to prepare all cases on the part of the

government for hearing before said court, and to argue the same when prepared; to cause testimony to be taken, when necessary to secure the interest of the United States; to prepare forms, file interrogatories, and superintend the taking of testimony, in the manner prescribed by said court, and generally to render such services as may be required of him from time to time, in the discharge of the duties of his office. Said solicitor shall be sworn to faithful discharge of the duties of his office, in the manner prescribed for the qualification of the judges in the first section of this act; and he shall receive a compensation of three thousand five hundred dollars per annum for his services, to be paid quarterly from the treasury of the United States.

SEC. 3. *And be it further enacted*, That the said court shall have authority to establish rules and regulations for its government; to appoint commissioners to take testimony to be used in the investigation of claims that may come before it; to prescribe the fees they shall receive for their services, and to issue commissions for the taking of such testimony, whether the same shall be taken at the instance of the claimant, or of the United States, and also to issue subpœnas to require the attendance of witnesses in order to be examined before such commissioners; which subpœnas shall have the same force, as if issued from a district court of the United States, and compliance therewith shall be compelled under such rules and orders as the court hereby created shall establish. When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when taken at the instance of the government, such fees, together with all postage incurred by the solicitor aforesaid in his official capacity, shall be paid out of the contingent fund provided

for said court. In all cases, when it can be conveniently done, the testimony shall be taken in the county where the deponent resides; and the commissioner taking the same is hereby authorized and required to administer an oath or affirmation to the witnesses brought before him for examination.

SEC. 4. *And be it further enacted*, That in all cases where it shall appear to the court that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony in the case, until the same shall have been reported by them to Congress, as is hereinafter provided: *Provided, however*, That if Congress shall, in such case, fail to confirm the opinion of said board, they shall proceed to take the testimony in such case.

SEC. 5. *And be it further enacted*, That in taking testimony to be used in support of any claim before said court, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe, and like opportunity shall be afforded the claimant in cases where testimony is taken on behalf of the United States under like regulations.

SEC. 6. *And be it further enacted*, That if any person shall knowingly and wilfully swear falsely before said court, or before any person or persons commissioned by them, or authorized by this act to take testimony in a case pending before said court at the time of taking said oath, or in a case thereafter to be submitted to said court, such person shall be deemed guilty of perjury, and, on conviction thereof, shall be subjected to the same pains, penalties, and disabilities which now are, or shall be hereafter, by law prescribed for wilful and corrupt perjury.

SEC. 7. *And be it further enacted*, That said court shall

keep a record of their proceedings, and shall, at the commencement of each session of Congress, and at the commencement of each month during the session of Congress, report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded. Any judge who may dissent from the opinion of the majority shall append his reasons for such dissent to the report; and such report, together with the briefs of the solicitor and of the claimant, which shall accompany the report, upon being made to either house of Congress, shall be printed in the same manner as other public documents. And said court shall prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect. And two or more cases may be embraced in the same bill, where the separate amount proposed to be allowed in each case shall be less than one thousand dollars. And the said court shall transmit with said reports the testimony in each case, whether the same shall receive the favorable or adverse action of said court.

SEC. 8. *And be it further enacted*, That said reports, and the bills reported as aforesaid, shall, if not finally acted upon during the session of Congress, to which the said reports are made, be continued from session to session, and from Congress to Congress, until the same shall be finally acted upon, and the consideration of said reports and bills shall, at the subsequent session of Congress, be resumed and the said reports and bills be proceeded with in the same manner as though finally acted upon at the session when presented.

SEC. 9. *And be it further enacted*, That the claims reported upon adversely shall be placed upon the calendar

when reported, and if the decision of said court shall be confirmed by Congress, said decision shall be conclusive; and the said court shall not, at any subsequent period, consider said claims unless such reasons shall be presented to said court as, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

SEC. 10. *And be it further enacted*, That it shall be the duty of the Speaker of the House of Representatives, within a reasonable time after the passage of this act, to appropriate such rooms in the Capitol at Washington, for the use of said court, as may be necessary for their accommodation, unless it shall appear to the Speaker that such rooms cannot be appropriated without interfering with the business of Congress; and, in that event, the said court shall procure, at the city of Washington, such rooms as may be necessary for the convenient transaction of their business.

SEC. 11. *And be it further enacted*, That said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and have the use of all recorded and printed reports made by the committees of each house, when deemed to be necessary in the prosecution of the duties assigned by this act. Said court shall appoint a chief clerk, whose salary shall be two thousand dollars per annum, and an assistant clerk, if deemed necessary, whose salary shall be fifteen hundred dollars per annum, and a messenger, whose salary shall be eight hundred dollars per annum, to be paid quarterly at the treasury. The said clerks shall be under the direction of said court in the performance of their duties, and for misconduct or incapacity may be removed from office by it; but, when so removed, said board shall make report thereof, with the cause of such removal, to Congress, if in

session, or at the next session of Congress. Said clerk and assistant clerk shall take an oath for the faithful discharge of their duties: *Provided*, That the head of no department shall answer any call for information or papers if, in his opinion, it would be injurious to the public interest.

APPROVED, February 24, 1855.

CHAP. XCII.—*An Act to amend "An Act to establish a Court for the Investigation of Claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five.*

Be it enacted by the Senate and House of Repeesentatives of the United States of America in Congress assembled, That there shall be appointed by the President, by and with the advice and consent of the Senate, two additional judges for the said court, to hold their offices during good behavior, who shall be qualified in the same manner, discharge the same duties, and receive the same compensation, as now provided in reference to the judges of said court; and that from the whole number of said judges the President shall in like manner appoint a chief-justice for said court.

SEC. 2. *And be it further enacted*, That all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid.

SEC. 3. *And be it further enacted*, That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall *under* [render] judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.

SEC. 4. *And be it further enacted*, That the said court of claims shall hold one annual session, commencing on the first Monday in October in each year, and continuing so long as may be necessary for the prompt disposition of the business of the court. The said court may prescribe rules and regulations for practice therein, and it may punish for contempt, in the manner prescribed by common law. It may appoint commissioners, and may generally exercise such powers as are necessary to carry out the powers herein granted to it. The judges, solicitors, and clerks of said court shall be admitted to the use of the congressional library, and also the law library, until a law library be provided for them. The said court may appoint a bailiff, who shall hold his office during four years, unless sooner removed by said court for cause, and who shall receive a salary of one thousand dollars, payable quarterly. The judges and

clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same. Said court shall have a seal, with such device as it may order. Members of either house of Congress shall not practice in said court of claims.

SEC. 5. *And be it further enacted*, That either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said supreme court may direct: *Provided*, That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided, further*, That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

SEC. 6. *And be it further enacted*, That the solicitor, assistant solicitor, and deputy solicitor of said court shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and it shall be their duty faithfully and diligently to defend the United States in all matters and cases before said court of claims; and in all cases taken by appeal therefrom to the supreme court; and no other fee or compensation than the salary of said solicitor, and assistant and deputy solicitors, shall hereafter, in any case, be paid to either of them, and no fee or compensation for services in either the supreme court or court of claims shall hereafter be allowed or paid in any case by the United States.

SEC. 7. *And be it further enacted*, That in all cases of final judgments by said court, or on appeal by the said supreme court where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of said court of claims, and signed by the chief justice, or, in his absence, by the presiding judge, of said court. And in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the said supreme court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid: *Provided*, That no interest shall be allowed on any claim up to the time of the rendition of the judgment by said court of claims, unless upon a contract expressly stipulating for the payment of interest, and it shall be the duty of the Secretary of the Treasury, at the commencement of each Congress, to include in his report *or* [a] statement of all sums paid at the treasury on such judgments, together with the names of the parties in whose favor the same were allowed: *And it is further provided*, That such payments shall be a full discharge to the United States of all claim or demand touching any of the matters involved in the controversy: *And provided further*, That any final judgment rendered against the claimant on any claim prosecuted as aforesaid shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

SEC. 8. *And be it further enacted*, That it shall be law-

ful for said court at the instance of the solicitor for the United States, to make an order in any case pending in said court, directing that the claimant or claimants in such case, or any one or more of them, shall appear, upon reasonable notice before any commissioner of said court and be examined on oath or affirmation touching any or all matters pertaining to said claim. And the examination of such claimant or claimants shall be reduced to writing by the said commissioner, and be returned to and filed in said court, and may, at the discretion of the solicitor for the United States, be read and used as evidence on the trial of said cause. And if any claimant or claimants, after such order has been made, and due and reasonable notice thereof given to him or them, shall fail to appear or shall refuse to testify or answer fully as to all matters within his knowledge material to the issue, the said court may, in its discretion, order that the said cause shall not be brought forward for trial until the said claimant or claimants shall have fully complied with the order of said court in the premises.

SEC. 9. *And be it further enacted*, That the jurisdiction of the said court shall not extend to or include any claim against the Government not pending in said court on the first day of December, Anno Domini eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

SEC. 10. *And be it further enacted*, That every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of

this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided, further,* That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

SEC. 11. *And be it further enacted,* That any person or persons who shall corruptly practise or attempt to practise any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part of any claim against the United States shall *ipso facto* forfeit the same to the Government; and it shall be the duty of the court of claims, in such cases, to find specifically that such fraud was practised or attempted to be practised, and thereupon give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same. Appeals may be taken from the court of claims to the supreme court, in all such cases, on all questions of law, in the manner herein provided for appeals in other cases.

SEC. 12. *And be it further enacted,* That any petition filed under this act shall be verified by the affidavit of the claimant, his agent, or attorney, stating that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all

just credits and offsets; and that he believes the facts as stated in said petition are true: *Provided, however,* That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof where the claim has been assigned, has at all times borne true allegiance to the Government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, which allegations may be traversed by the Government, and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed.

SEC. 13. *And be it further enacted,* That all laws and parts [of laws] inconsistent with the provisions of this act are hereby repealed.

SEC. 14. *And be it further enacted,* That no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

APPROVED, March 3, 1863.

Office Supreme Court U. S.
FILED,
JAN 23 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term 1888.

THE UNITED STATES, Appellant,
vs.
CARRIE JONES, Appellee.
No. 1103.

Appeal from the Circuit Court of the United States for the District of Oregon.

This suit was commenced in the United States Circuit Court for the District of Oregon for the purpose of obtaining a decree requiring the United States to issue a patent for a certain tract of land in Oregon, claimed as timber land. The suit is brought under the act of Congress approved March 3d, 1887, (24 U. S. Stats., 505,) entitled "An act to provide for the bringing of suits against the Government of the United States."

The plaintiff, in her petition, alleges that the land in question is timber land, within the meaning of the act of Congress of June 3d, 1878, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory" (20 U. S. Stats., 89); that the land was purchased from the United States by one John R. Frierson, who, on June 21st, 1883, paid to the Receiver of the United States Land Office at Oregon City $400, the purchase price and the land office fees, and on that day obtained from the Receiver a receipt or certificate for such purchase-money; that on June 26th, 1883, Frierson sold the land to plaintiff for a valuable consideration, and assigned his receipt and cer-

tificate, and all his interest therein to her; and on July 27th, 1883, Frierson executed and delivered to plaintiff a warranty deed for the land.

That the United States has retained the $400 paid for the land, and has neglected and refused to issue and deliver a patent therefor, although every act required to be done to vest the title in plaintiff (except the issuance and delivery of the patent for the land) has been performed. And that the claim for a patent has not been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

To this petition the United States demurred, thereby admitting the facts stated to be true. The demurrer having been overruled by the court, and the defendant declining to further answer, a decree was entered substantially as prayed for in the petition, from which decree the defendant has appealed to this court.

The act of March 3d, 1887, very materially enlarged the jurisdiction of the Court of Claims and provides that it shall extend to "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable."

Is the demand of the plaintiff that the United States Government issue and deliver to him a patent for land sold by it to him and paid for by the plaintiff a claim within the meaning of this act?

A *claim* is a demand of right—a challenge of ownership.

Worcester's Dictionary.

"A *claim* is a challenge by a man of the propriety or ownership of a thing which he has not in possession but which is wrongfully detained from him."

Stowell *v.* Lord Zouch Plowden, 359.

Littleton says that a release of all demands is the best release to him to whom it is made; and Lord Coke says that the word *demand* is the largest word in law except *claim.*

Littleton, sec. 508; Co. Lit., 291.
8 Bacon's Ab., 283.

A *claim* is in a just judicial sense a demand of some matter, as of right, made by one person upon another to do or forbear to do some act or thing as a matter of duty.

Prigg *v.* Pennsylvania, 16 Peters, 614, 615.

The word *claim* is not limited to a demand for money, but extends to and includes a claim for bounty land.

United States *v.* Wilcox, 4 Blatchf., 388.

Claim is the word used to designate the interest which a person has in a portion of the public lands of the United States when he attempts to acquire an ownership therein. It is the word used in common parlance, as well as in the acts of Congress, as *pre-emption claim, a homestead claim, a donation claim,* &c. And in the Timber Act of June 3d, 1878, under which the plaintiff seeks to recover in this suit these words occur: "*Adverse claim,*" "*valid claim,*" "*mining claim,*" "*nature of his claim,*" to denote the interest which one may have in the public lands.

In the case under consideration the plaintiff seeks to obtain a title for a *timber claim* from the United States, the Government having been paid the purchase-money for the same.

Where an individual buys and pays for land he is en-

tificate, and all his interest therein to her; and on July 27th, 1883, Frierson executed and delivered to plaintiff a warranty deed for the land.

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In the case under consideration the plaintiff seeks to obtain a title for a *timber claim* from the United States, the Government having been paid the purchase-money for the same.

Where an individual buys and pays for land he is en-

titled to a deed from the vendor, and, in case of refusal to convey, the vendee would be entitled to redress against him in a court of equity to compel him to convey. The act of March 3d, 1887, confers jurisdiction on the Court of Claims and the Circuit Courts to hear and determine matters "in respect of which claims a party would be entitled to *redress* against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

In short, it seems to have been intended by this act to place the United States in the same situation as a private individual, so far as liability to suit is concerned. And the Government, as well as an individual, may now, by a decree of court, be required to convey land which it has sold, and for which it has been paid.

THE CLAIM OF THE PLAINTIFF IS FOUNDED UPON AN EXPRESS CONTRACT.

The claim of the plaintiff is not one of those excepted in the act from the jurisdiction of the Court of Claims. It is a claim founded upon an express contract made by the Register of the local land office, an officer expressly authorized by law to sell the public lands of the United States. The purchase-money for the land was duly paid to this officer, who thereupon delivered to the purchaser a certificate which entitled him to a patent upon its presentation to the Commissioner of the General Land Office.

The Timber Act of June 3d, 1878, in the third section, among other things, provides:

"And upon payment to the proper officer of the purchase-money of said land, together with the fees of the Register and the Receiver, as provided for in the case of mining claims in the 12th section of the act approved May 10th, 1872, the applicant may be permitted to enter

said tract, and, *on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue therefor.*"

The certificate issued by the Register of the local land office is in the following form:

"No. —. LAND OFFICE AT OREGON CITY,
June 21st, 1883.

It is hereby certified that, in pursuance of law, John R. Frierson, residing in Columbia county, State of Oregon, on this day purchased of the Register of this office the S. E. ¼ of section No. 30, in township No. 7 N., of range 3 west, of the Willamette meridian, containing 160 acres, at the rate of two dollars and fifty cents per acre, amounting to four hundred dollars and — cents, for which the said John R. Frierson has made payment in full, as required by law.

Now, therefore, be it known that, on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said John R. Frierson shall be entitled to receive a patent for the lot above described.

L. T. BARCH,
Register."

The foregoing certificate was made by the Register in accordance with the requirements of the act of June 3d, 1878, commonly known as the Timber Act. It is subject to no condition whatever, and the duty of the Commissioner of the General Land Office was simply to issue a patent to the purchaser of the land which the Government had sold. The law gave that officer no authority to revise or review the proceedings of the Register and Receiver of the local land office. If these acts of the Register and Receiver of the Land Office at Oregon City on behalf of the United States did not constitute an express contract with the Government of the United States, then it is difficult to see how any contract can be made between the Government and an individual.

Can a Decree be made Requiring the United States to Specifically Perform a Contract?

It was contended by the United States District Attorney, on the hearing of the demurrer, that the equity jurisdiction conferred upon the Court of Claims did not authorize it to render a decree for the specific performance of a contract to convey lands, but only decrees or judgments for the payment of money against the United States. It was then insisted that no provision was made in the act of Congress to enforce any decree for the specific performance of a contract, and that even if the court should make such a decree, it would amount to nothing because of the inability of the court to enforce it. Even if this were so, it would constitute no valid objection to the jurisdiction of the court.

"The incapacity to force the decree *in rem.* constitutes no objection to the right to entertain such suit."

1 Story Eq. Jur., Sec. 743, citing—

The Earl of Arglasse *v.* Muschamp, 1st Vernon, 135.

But we insist that the court has ample power to enforce such a decree in case of refusal on part of the proper officer to issue a patent for the land. His duty, then, being only a ministerial one, a mandamus would lie to enforce its performance.

But why should the Court of Claims be limited in its equity jurisdiction any more than in law? The act of Congress certainly makes no distinction in the extent of the powers granted in respect to legal or equitable relief. It gives to the court jurisdiction to hear and determine cases "in respect of which claims the party would be entitled to *redress* against the United States in a court of law, equity, or admiralty if the United States were suable."

The object was to enable an aggrieved party to obtain redress in equity (not merely payment of money) in cases

where a court of law could not give it by award in damages for a breach of contract.

By the 5th section of the act the plaintiff in a suit against the United States is required, among other things, to set forth in his petition "a succinct statement of the facts upon which the claim is based, the *money or other thing claimed*," &c.

This clearly shows that the plaintiff, having a claim against the United States, is not confined to a mere demand for money, and that if it be a claim of an equitable nature he can have *redress* in the same manner as he could in a court of equity if the United States were suable as a private individual.

The act of Congress further provides in section 7 that—

"If the suit be in equity or admiralty the court shall proceed with the same according to the rules of such courts."

We, therefore, submit that, proceeding according to the rules of a court of equity, the plaintiff has a right to insist on the specific performance of his contract with the United States, and that he need not resort to a proceeding in the nature of an action at law to recover damages for the breach of such contract against the United States.

JAMES K. KELLY
and W. SCOTT BEEBE,
Attorneys for Appellee.

THE UNITED STATES, Appellant,
vs.
JAMES B. MONTGOMERY. } No. 1482.

The facts in this case are quite similar to those in the case of the United States *v.* Jones and the principles of law involved are the same. It has therefore, been agreed that the decision of the Court in that case shall govern

in this. There is, however, one additional feature in this suit which did not exist in the case of the United States *v.* Jones, to wit, the residence of the plaintiff.

J. B. Montgomery, the petitioner, was at the time of bringing this suit, a resident and citizen of the State of Oregon, while the land, which was the subject of contract was situate in Washington Territory.

One of the causes of demurrer by the U. S. District Attorney is:

"That the land described in the petition appears upon the face thereof to be situate without the jurisdiction of this Court."

This is not a local action to recover the possession of the land, but a transitory one to enforce the specific performance of a contract concerning the same. A court of equity in such a case operates by a decree *in personam* on the defendant, and not *in rem.*, on the subject matter.

In *Massie v. Wells*, 6 Cranch 148, Ch. J. Marshall, after citing a number of authorities upon this point, says:

"Upon the authority of these cases, and others which are to be found in the books, as well as upon general principles, this court is of opinion that in a case of fraud of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court, may be affected by the decree."

So in *Walkins v. Holman*, 16 Peters, 25, it was held that a court in chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may enforce its decree by process against the defendant.

But it is needless to cite other authorities upon this point, as the act of Congress conferring jurisdiction upon the court, in cases of this kind, requires the petitioner to bring his suit in the District where he resides, and not in the District where the land, which is the subject of the controversy, may be situated.

JAMES K. KELLY,
Attorney for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT,
v.
CARRIE JONES.

THE UNITED STATES, APPELLANT,
v.
HENRY TAUBENHEIMER.

THE UNITED STATES, APPELLANT,
v.
JAMES B. MONTGOMERY.

THE UNITED STATES, APPELLANT,
v.
HARRISON G. DREW.

BRIEFS FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, APPELLANT, v. CARRIE JONES. } No. 1103.

THE UNITED STATES, APPELLANT, v. HENRY TAUBENHEIMER. } No. 1102.

THE UNITED STATES, APPELLANT, v. JAMES B. MONTGOMERY. } No. 1482.

THE UNITED STATES, APPELLANT, v. HARRISON C. DREW. } No. 1061.

BRIEFS FOR THE UNITED STATES.

STATEMENT.

These are petitions brought in the circuit court of the United States for the district of Oregon, the prayers of which are that the petitioners be decreed to be owners of

certain tracts of land, and that the United States issue and deliver or cause to be issued and delivered patents granting and conveying said described property to the respective complainants.

The petitions are in the nature of bills in equity to enforce specific performances. There are but slight differences in the several cases. In *Taubenheimer* (1102) and *Montgomery* (1482) the complainants purchased the land and paid the receiver the purchase money. In *Jones* (1103) the complainant is the assignee of Frierson, the original purchaser.

Demurrers were filed to these petitions by the defendants. The facts conceded by the demurrer in each case are as follows:

That the petitioner is a citizen of the State of Oregon; that the land was subject to entry and purchase under the act of March 3, 1878 (20 Stat., 89), entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," and was valuable for timber, but unfit for cultivation; that petitioner having theretofore complied with all the requirements of said act, and of the regulations governing the manner of acquiring land under said act, so as to enable him to pay for the same and claim a patent, did purchase and pay for the same the price of $2.50 per acre; that the land exceeds the value of $1,000, and does not exceed the value of $10,000; that the receiver and defendant have retained the said money; that no patent has issued, and that defendants neglect and refuse to issue the same, and deny the claimant's right to have said patent, and deny his right to the property.

The causes of demurrer were that the matters and things set forth do not show any claim at law, equity, or admiralty against the defendant, and that the court had not jurisdiction.

The demurrer was overruled, and defendant electing to stand upon the same and declining to further plead, it was adjudged and decreed that the plaintiff is the lawful purchaser of the lands described in the petition, and that the defendant, the United States, do issue and deliver, or cause to be issued and delivered in accordance with law, a patent granting and conveying said lands to the petitioner. It was further decreed in the Jones case that the patent should inure to the benefit of the assignee of the original purchaser.

From this decree the defendant appealed.

ASSIGNMENT OF ERRORS

I. The court erred in entertaining jurisdiction of this case.

II. The court erred in entering a decree for the issuance and delivery of a patent for lands.

BRIEF OF ARGUMENT.

These suits were brought under the act of March 3, 1887, "An act to provide for the bringing of suits against the Government of the United States (24 Stat., 505), in the circuit court for the district of Oregon. The second section of that act gives to district and circuit courts concurrent jurisdiction with the Court of Claims within cer-

tain limits as to the amount of claims. The first section defines the jurisdiction as follows:

> All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

The circuit courts were created by act of Congress and they are not authorized to exercise any jurisdiction, except where the jurisdiction was conferred by an act of Congress. Jurisdiction can not be exercised by a circuit court in a suit against the United States unless the plaintiff can bring his case within some act of Congress (*United States* v. *Eckford*, 6 Wall., 484; *United States* v. *Lee*, 106 U. S., 196).

The statute above cited is the only one in which this latter jurisdiction is conferred. Before this enactment the Court of Claims was the only court in which the United States could be sued. And now, since the jurisdiction of the circuit courts is made concurrent, it must be deter-

mined by the jurisdiction of the Court of Claims. The extent and limitations of the jurisdiction of that court must be the extent and limitations for the circuit courts, except where differences are made in this act of 1887. The primary and critical question, then, in considering the cases at bar, is the scope of the jurisdiction of the Court of Claims.

I.

THE COURT OF CLAIMS.

The Court of Claims owes its origin to the accumulation of large numbers of private claims against the Government presented to Congress. The organic act was passed February 24, 1855 (10 Stat. L., 612). By it a court was established with authority "to hear and determine all claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to it by either house of Congress."

The next act, March 3, 1863, was "An act to amend an act to establish a court for the investigation of claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five (12 Stat. L., 765). The second and third sections declare the additional jurisdiction:

> SEC. 2. *And be it further enacted*, That all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an

executive department, or upon any contract, express or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid.

SEC. 3. *And be it further enacted*, That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand, both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.

By section 5 it was enacted:

That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said Supreme Court may direct: *Provided*, That such appeal shall be taken within ninety days of the rendition of such judgment or decree: *And provided*

further, That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

Section 7 was—

That in all cases of final judgments by said court, or on appeal by the said Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of said court, and signed by the Chief-Justice, or, in his absence, by the presiding judge of said court; and in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the said Supreme Court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment, as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid: *Provided*, That no interest shall be allowed on any claim up to the time of the rendition of the judgment by said Court of Claims, unless upon a contract expressly stipulating for the payment of interest, and it shall be the duty of the Secretary of the Treasury, at the commencement of each Congress, to include in his report a statement of all sums paid at the Treasury on such judgments, together with the names of the parties in whose favor the same were

allowed: *And it is further provided*, That such payments shall be a full discharge to the United States of all claim or demand touching any of the matters involved in the controversy: *And provided further*, That any final judgment rendered against the claimant on any claim prosecuted as aforesaid shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

Section 10 was the bar of limitation:

That every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided further*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

The last section provided—

That no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

This court decided, in *Gordon* v. *United States* (2 Wall., 561), (the opinion of Chief-Justice Taney, prepared, but not delivered, is reported in 117 U. S. R., 697), that no appeal would lie from the Court of Claims to the Supreme Court, because all that the court was authorized to do was to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimate, and Congress sanctions it by an appropriation, it is then to be paid and not otherwise; that when the Secretary asks for this appropriation, the propriety of the estimate for this claim, like all other estimates of the Secretary, will be opened to debate, and whether the appropriation will be made or not will depend upon the majority of each house; and, therefore, that the real and ultimate judicial power will be exercised by the Legislative Department and not by that department to which the Constitution has confided it.

Whereupon, on March 17, 1866, Congress passed an act repealing this section (14 Stat., 9), and giving an appeal from the final judgment or decree in all cases theretofore decided, of the character mentioned in the fifth section of the act of March 3, 1863. Since then appeals have been entertained.

These provisions are carried into the Revised Statutes, Title XIII, chapter 21.

They embrace the general and permanent jurisdiction of the court in cases which might be prosecuted to judgment prior to the act of March 3, 1887. As far as the character of the subject-matter of suits is concerned, they embrace the jurisdiction now.

By virtue of this legislation the Court of Claims is constituted one of those inferior courts which Congress

authorizes, and has jurisdiction of contracts between the Government and the citizen (*United States* v. *Klein*, 13 Wall., 128, 145).

Its erection was voluntary upon the part of Congress. It was the first tribunal in this country in which the Government could be called to answer. "It was established," says Mr. Chief-Justice Chase, in Klein's Case, "for the triple purpose of relieving Congress, and of protecting the Government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims."

Thus constituted, this court can have no jurisdiction and exercise no authority unless conferred by some statute. In the first case which came to the Supreme Court on appeal, *De Groot* v. *United States*, 5 Wall., 419, 431, the doctrine, which has been frequently repeated, is clearly laid down by Mr. Justice Miller:

> If, therefore, the Court of Claims has the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against that defendant, it is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed.

It has been so uniformly decided and acted upon, both in the Court of Claims and the Supreme Court, that the causes of action are claims for the satisfaction of which a money judgment may be given, that to argue the proposition is wasteful and ridiculous excess. The question was directly presented in the case of *United States* v. *Alire*, (6 *Wall.*, 573). The petitioner having made application to

the Commissioner of Pensions for 160 acres of bounty lands, which was refused by the Commissioner and the Secretary of the Interior, brought suit in the Court of Claims, praying that a bounty-land warrant be made and delivered to him by the proper officer.

Mr. JUSTICE NELSON delivered the opinion of the court:

> The only question presented in the record, which we shall examine, is whether or not the court below had jurisdiction of the cause.
>
> It will be seen by reference to the two acts of Congress on this subject, that the only judgments which the Court of Claims are authorized to render against the Government, or over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the Government to the petitioner. And although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the Government.
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> This view is confirmed by the judgment of this court in the case of *Gordon, Adm'r.*, v. *United States* (2 *Wall.*, 561), in which the court denied any jurisdiction over the case on account of the power of the Executive Department over its judgment by the fourteenth section of the act of 1863. That section was repealed by the first section of the act of March 17th, 1866.
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> The decree or judgment in the present case is that

the claimant recover of the Government a military land-warrant for one hundred and sixty acres of land, and that it be made out and delivered to the said Julian Alire by the proper officer, and the decree to be certified and remitted to the Secretary of the Interior. We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the Court of Claims, to be obeyed or satisfied; nor does either court possess any authority to render such a judgment, as is apparent from a perusal of the seventh section of the act of 1863, and which is the only one providing for the rendition of a judgment or decree in any case before the court below.

Even if the first section of the act of 1855 and the second of 1863 could be construed as giving a jurisdiction in cases other than money demands against the Government, no judgment could be rendered by the court below, and, of consequence, the carrying into effect their finding must depend on the act of 1855. But we are of opinion that it was intended by the several provisions of the act of 1863 that the cases to be heard were to pass into a judgment as prescribed in the seventh section of the latter act, and hence they must be such in their nature and character as may admit of a judgment or decree in conformity with its provisions.

(See also *Brown* v. *United States*, 6 Ct. Cls., 171; *United States* v. *Anderson*, 9 Wall., 56; *Smoot's Case*, 15 Wall., 36; *Gibbons* v. *United States*, 8 Wall., 269; *Langford* v. *United States*, 101 U. S., 341; *Knote* v. *United States*, 95 U. S., 149.)

In *Case* v. *Terrell* (11 Wall., 199, 201) Mr. Justice Miller speaks of "moneyed judgments" as being peculiarly the subject of this jurisdiction.

In *Bonner* v. *United States* (9 Wall., 156), which was a suit for compensation for lands ceded for his benefit by virtue of his holding a military land warrant, on the allegation that the Government had wrongfully appropriated to other uses the lands, this court uses the following language:

> If this position (the claimant's) be correct, this claim is based on the theory that the United States has violated the trust contained in the deed of cession of the Northwestern Territory, and is bound in good conscience to furnish compensation to the Virginia beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity, and if it were a controversy between two private suiters, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them.
>
> Immunity from suit is an incident of sovereignty, but the Government of the United States, in a spirit of great liberality, waived that immunity in favor of those persons who had claims against it which were founded upon any law of Congress or regulation of an Executive Department, or upon any contract with it, express or implied, and gave the Court of Claims the power to hear and determine cases of this nature.
>
> The inquiry then arises whether the present case, in view of this limited jurisdiction, is one that the Court of Claims had a right to consider. The answer to this question seems to us of easy solution. It is not pretended that there was any regulation of

a Department to justify the entries in dispute, and it is certain instead of having a law of Congress to rest upon, they were made in violation of the whole course of legislation by Congress on the subject. Congress has not only, in fixing the boundary line of the reservation, excluded these entries, but has also limited the time in which the holders of warrants of the class in question should have the right to locate them, and, in addition to this, has forbidden their location on tracts of land for which patents had been previously issued, or which had been previously surveyed.

As the land in question had been previously patented to individuals, or granted for the use of schools, it follows that the attempt on the part of the claimant to locate his warrants on them was contrary to law, and that the claim which he now makes for compensation, because of the failure of this proceeding, can not be said to be founded on a law of Congress, nor can it be said to be based on a contract in the sense of the law conferring jurisdiction on the Court of Claims. That court was authorized to enforce legal rights and obligations, but it could not proceed further and judge of the equities between the citizen and his Government. In the absence of legislation by Congress the holder of a Virginia military bounty land-warrant can have no legal right against the United States for compensation on the allegation that the Government has wrongfully appropriated to other uses the lands ceded for his benefit.

It is only a contract authorized by law that the Court of Claims can consider, and as there is no law of Congress on this subject there is nothing on which that court could base a judgment against the United States, if, in the opinion of that tribunal, it had not fulfilled its duties towards the beneficiaries under the

Virginia deed of cession. The liability of the Government, if at all, arises out of the breach of an accepted trust, and that liability can not be enforced at law. The claimant is in no better position because the Government is the trustee than he would be if a private person occupied that relation, and it is very clear, if such were the case, that a court of equity would alone have the power to deal with him.

As the Government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations, it follows that the remedy of the claimant, if any now exists, is with Congress.

In *United States* v. *Clark* (96 U. S. R., 37, 43), this court, construing the Statute of Limitations (Rev. Stat., § 1069), says:

The petition of plaintiff in this suit does not, in the just sense of the word, set forth a claim against the United States. It sets up a defense to a claim of the United States against the plaintiff. * * * The plaintiff asks, and by the very terms of the statute under which the Court of Claims acts can obtain no judgment for money against the United States, nor fix any liability on the Government to pay him anything.

This suit was brought by Clark under the act of May 9, 1866 (14 Stat. L., 44; Rev. Stat., §§ 1059, 1062), which authorizes the Court of Claims to hear and determine the claim of any disbursing officer for relief from responsibility on account of capture or other loss of funds while in the line of his duty, and for which such officer was and is held responsible; and in case the loss has been found to be without fault or negligence on the part of such officer, to make a decree setting forth the amount thereof which shall be allowed as a credit by the accounting officers of the Treasury in the settlement of his accounts.

II.

ACT OF MARCH 3, 1887.

The subject-matter of the jurisdiction of the Court of Claims in the meaning of terms in the statutes of 1855 and 1863 having thus been repeatedly and definitely stated, we are brought directly to a question of difference. For it can not be gainsaid that under these acts these petitioners could not maintain their suits. What changes, what amplifications are made by the act of March 3, 1887? If any there are, we are at fault.

The material language of the Revised Statutes, which, we have seen, is the digest of the previous statutes, is: *All* CLAIMS *founded upon any law of Congress, or upon any regulation of an executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any person making claim against the Government in said court.*

The act of March 3, 1887, is:

> *All* CLAIMS founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United

States either in a court of law, equity, or admiralty, if the United States were suable.

* * * * *

All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court.

* * * * *

The subject-matter is not altered a particle. It is still and all the time CLAIMS. The obligation must still arise from contract. The words, "for damages, liquidated or unliquidated, in cases not sounding in tort," are but affirmative of what had always been declared the jurisdiction. The words "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable," merely extend a remedy over matters of which the court had cognizance before. The act emphasizes the limitation to claims, which remains the entire superstructure of the jurisdiction.

The provisions of set-offs and counter-claims are the same. The limitation for bringing suits is the same. The trial by the court without a jury is the same. The practice is sought to be made homogeneous. Appeals are provided for in the same manner. The judgments and decrees are to bear interest until the time when an appropriation is made for their payment, and they are to be reported to Congress, just as they always have been in the past.

Nor can any enlargement of jurisdiction be gathered

from the fifth section. By that is provided what allegations the petition shall contain. It will scarcely be seriously contended that the use of the word *thing* in its connection with the averments of a pleading can have any effect in interpreting the words of the jurisdictional section.

The authorities cited by the learned court in the Jones Case define the word claim when used in an entirely different collocation. Mr. Justice Story, in *Prigg* v. *Pennsylvania* (16 Pet., 615), was speaking of the word as used in the Constitution, Article IV, section 2:

> No person held to service or labor in one State, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on CLAIM of the party to whom such service or labor may be due.

CLAIM there refers more particularly to the remedy for enforcing a right. It is the demand for a specific thing rather than the thing itself. The learned jurist is arguing the question of the necessity for legislation to give force to the provisions of this constitutional clause. He says:

> The slave is to be delivered up on the claim. By whom to be delivered up? In what mode to be delivered up? How, if a refusal takes place, is the right of delivery to be enforced? Upon what proof? What shall be the evidence of a rightful recapture or delivery? When and under what circumstances shall the possession of the owner, after it is obtained, be conclusive of his right, so as to preclude any further inquiry or examination into it by local tribunals or

otherwise, while the slave, in possession of the owner, is *in transitu* to the State from which he fled.

These, and many other questions, will readily occur upon the slightest attention to the clause; and it is obvious that they can receive but one satisfactory answer. They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner (as can not well be doubted), the natural inference certainly is that the National Government is clothed with the appropriate authority and functions to enforce it.

It is plain that this consideration is entirely different from what arises under the act of 1887. The words are different, the sense is different. In the latter statute the term comprehends the *subject matter* of the jurisdiction and the suits.

In significant accord with these views is the language used in the second section, which is the grant of the jurisdiction—of the concurrent jurisdiction—to the circuit and district courts. This jurisdiction extends for the district courts "to all *matters* named in the preceding section where the *amount* of the *claim* does not exceed one thousand dollars;" for the circuit courts "where the *amount* of such *claim* exceeds one thousand dollars and does not exceed ten thousand dollars." How different this from the terms of the judiciary act of 1789. There the jurisdiction is where the *matter* in dispute exceeds the *sum or value* of, etc. Here the matter in dispute must be something, and that something a *claim*, whose distinctive character is an amount of money. The meaning we place upon

this act is borne out by both the analogies and differences of all legislation upon the jurisdiction of these statutory courts. (See Rev. Stat., sec. 639; act of March 3, 1875, secs. 1 and 2, 18 Stat. L., 490.)

III.

THERE IS NO JURISDICTION OF THE MATTER STATED IN THIS BILL IN THE CIRCUIT COURT, BECAUSE THE JURISDICTION IS PLACED IN THE EXECUTIVE DEPARTMENT.

The bill of complaint or petition in this case states that one Frierson, having theretofore complied with all the requirements of said act and of the regulations governing the manner of acquiring land under said act, so as to entitle him to pay for the same and claim a patent from the United States, did, on a certain day, pay the purchase-money for the said land to the receiver of the land office. The theory of the petitioner, which appears to have been sustained in the court below, is that this act of payment and the reception of the receiver's certificate entitled the person paying to the immediate issuance of the patent; that nothing remained to be done save the ministerial act by the officers of the Government.

This doctrine is subversive of the idea of the treatment of the public lands as provided for in the Constitution and the statutes. The legal title remains in the United States until the patent has been issued. There can be no ground for the interposition of a court of equity as affecting the Government until that act is performed. The following provisions of the Revised Statutes are gen-

eral and apply to all cases, with some minor exceptions not material to be considered in this controversy:

SEC. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

SEC. 458. All patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President and countersigned by the Recorder of the General Land Office; and shall be recorded in the office, in books to be kept for the purpose.

SEC. 459. It shall be the duty of the recorder of the General Land Office, in pursuance of instructions from the Commissioner, to certify and affix the seal of the office to all patents for public lands, and to attend to the correct engrossing, recording, and transmission of such patents. He shall prepare alphabetical indexes of the names of the patentees, and of persons entitled to patents; and he shall prepare such copies and exemplifications of matters on file or recorded in the General Land Office as the Commissioner may from time to time direct. Whenever the office of recorder shall become vacant, or in case of his sickness or absence, the duties of his office shall be performed ad interim by the principal clerk on private land claims.

SEC. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the

provisions of this title not otherwise specially provided for.

And by the terms of this act of June 3, 1878, for the sale of timber lands, it is provided that the papers and testimony in the case shall be transmitted to the General Land Office; and, further, that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

This court in the case of *The United States* v. *Schurz* (102 U. S., 378, 395) speaking by Mr. Justice Miller, says:

> The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.
>
> Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen.
>
> This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

In *Johnson* v. *Towsley* (13 Wall., 72), the questions we are arguing were fully considered. In the syllabus of that case it is stated as follow:

> The decisions of this court on this subject establish:
>
> (I) That the judiciary will not interfere by mandamus, injunction, or otherwise with the officers of the land department in the exercise of their duties while the matter remains in their hands for decision.
>
> (II) That their decision on the facts which must be the foundation of their action, unaffected by fraud or mistake, is conclusive in the courts.
>
> (III) But that after the title has passed from the Government to individuals, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

When fraud or mistake or misconstruction of the law of the case exist the United States or any contesting claimant for the land may have relief in a court of equity after the patent has issued. (*Moore* v. *Robbins*, 96 U. S. R., 530.)

McLean v. *The United States* (95 U. S. R., 750) was a case brought in the Court of Claims to recover certain sums which petitioner claimed were due to him for compensation as a deputy postmaster upon re-adjustment of salary which the Postmaster-General should have made under the law, but neglected and refused to make. This court, in deciding he had no cause of action, said:

> Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster-

The petitioner claims as the assignee of the person who, she alleges, is entitled to the patent. The patent would have to be issued, if at all, to Frierson, who paid the purchase-money. Frierson, upon the face of the bill, is a necessary party.

All of which is respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES *vs.* CARRIE JONES.	No. 1103.
THE UNITED STATES *vs.* HENRY TAUBENHEIMER.	No. 1102.
THE UNITED STATES *vs.* JAMES B. MONTGOMERY.	No. 1482.
THE UNITED STATES *vs.* HARRISON C. DREW.	No. 1061.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

1.

THE CAUSES SUBMITTED TO THE JURISDICTION OF THE COURTS UNDER THE ACT OF 1887 ARE ONLY CLAIMS FOR MONEY.

A.

The signification of the word "claim," under the act of 1855.

The act of the 24th of February, 1855 (section 1059 of the Revised Statutes), provides:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon any law of Congress, or upon any regulation of an Executive De-

partment, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress.

In the case of *United States vs. Alire* (6 Wall., 575) it is ruled:

> It will be seen by reference to the two acts of Congress on this subject that the only judgments which the Court of Claims are authorized to render against the Government, and over which the Supreme Court have any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made are judgments for money found due from the Government to the petitioner; and although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the Government.

The jurisdiction vested by the acts of 1855 and 1863 did not extend to equitable claims.

In the case of *Bonner* vs. *United States* (9 Wall., 160) it is ruled:

> The liability of the Government, if at all, arises out of the breach of an accepted trust, and that liability can not be enforced at law. The claimant is in no better position because the Government is the trustee than he would be if a private person occupied that relation, and it is very clear if such were the case that a court of equity would alone have the power to deal with him.

> As the Government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations, it follows that the remedy of the claimant, if any now exists, is with Congress.

For the same reason the jurisdiction did not extend to claims in admiralty, or for the enforcement of liens, which are generally prosecuted by proceedings *in rem*.

In the case of *Briggs* vs. *Light Boats* (11 Allen, 156), it is ruled that while the right to a lien in admiralty might exist against a vessel of the United States, there was no remedy in a State court to enforce it.

B.

The act of 1887 *also limits the jurisdiction to claims, but enlarges these claims to equitable ones, and claims in admiralty.*

The first section of the act of the 3d of March, 1887 (24 U. S. Stats., 505), provides:

> That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First: All *claims* founded upon the Constitution of the United States or any law of Congress except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which *claims* the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: *Provided, however*, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction

> to hear and determine claims growing out of the late civil war, and commonly known as war claims, or to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

The language of the section confines the jurisdiction to *claims*. It is "all claims," "which claims," "war claims," and "other claims." The second section provides:

> The district courts * * * shall have jurisdiction * * * where the *amount* of the *claim* does exceed one thousand dollars, and the circuit courts * * * shall have * * * jurisdiction * * * where the *amount* of such *claim* exceeds one thousand dollars and does not exceed ten thousand dollars.

The fifth section prescribes the mode of procedure. It requires the petitioner to set forth "the nature of his claim" and the facts "upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law."

The language "the money or other *thing* claimed" in this section does not imply that the suit may be for a thing, but against it. As the jurisdiction was extended to equitable and admiralty claims by the first section, and as in equity or admiralty the claim might be of such a character that it could be enforced only by a suit against the *thing*, which would be the thing claimed, it was necessary in the procedure to use the word "thing" as well as the words "money" and "damages." If the United States should buy a piece of land against which a mortgage lien

existed prior to the purchase, a bill in equity might be filed to foreclose. The bill would be for the land, but the decree would be for the payment of the money claimed.

In admiralty the property of the United States might be subject to a lien for salvage, or other maritime lien. Proceedings to enforce such a lien would be *in rem*, and in such cases the right would exist notwithstanding the ownership of the thing by the United States. But there was no remedy to enforce it, because of the exemption of the Government from suit. That the right existed is ruled in the case of *Briggs* vs. *Light Boat* (7 Allen, 287). That there was no remedy in that case after the boats became the property and passed into the possession of the Government was ruled in the case of *Briggs* vs. *Light Boats* (11 Allen, 157).

In the case of *The Syren* (7 Wall., 152), the United States had voluntarily brought the vessel into a court of admiralty, and thereby subjected it to the judgment of the court. The claim of an intervenor, whose vessel had been sunk in collision with the prize, was allowed as damages out of the proceeds. But it ruled that liens could not be enforced at the suit of a party against the property, where the property was in the actual possession of the Government, Field, Justice, in the opinion declaring:

> So also express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the Government, incapable of enforcement by legal proceedings (page 157).

In the case of *The Davis* (10 Wall., 15) the above cases are cited with approval, and the distinction made, that in admiralty proceedings if the actual possession was in the Government, the lien was not enforceable, but if the actual possession were in a third party, it was, by proceedings *in rem*.

In *Vandewater* vs. *Mills* (19 How., 89) Greer, justice, ruled:

> The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession, or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*.

As therefore the jurisdiction over maritime claims was necessarily *in rem*, the words "or anything claimed" in this section were necessary to include all the claims embraced in the first section of the act, and does not support the inference that all equitable and maritime powers were intended to be embraced in the jurisdiction.

The tenth section of the act provides that in all cases when the judgment or decree is adverse to the United States, the full record shall be transmitted to the Attorney-General for his direction as to whether an appeal or writ of error shall be taken, and concludes with the proviso, as follows:

> Provided that no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree, interest shall be computed thereon, at

the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

Whatever the judgment or decree might be, this proviso shows it was to be satisfied by payment, and a payment under an appropriation to be made. It shows that interest was to be collected upon all final judgments and decrees authorized to be rendered under this act. The inference is inevitable that the judgments and decrees must be for money, for interest can not be collected upon a mandamus or on a decree for specific performance of contract.

When general jurisdiction is given over all classes of subject-matter, including property as well as money, the jurisdiction is recognized by using the words "sum or value," or "value," instead of "amounts," as used in this act.

Section 631 of the Revised Statutes, providing for appeals in equity and admiralty cases from the district to the circuit courts, is:

> Where the matter in dispute exceeds the *sum* or *value* of fifty dollars.

Section 633 of the Revised Statutes, providing for writs of error to district courts, is:

> Where the matter in dispute exceeds the *sum* or *value* of fifty dollars.

Section 691, providing for writs of error in civil causes from the circuit courts to the Supreme Court, is:

> Where the matter in dispute, exclusive of costs, exceeds the *sum* or *value* of two thousand dollars.

Section 690, providing for appeals to this court from the circuit courts in equity and maritime cases, is:

> Where the matter in dispute, exclusive of costs, exceeds the *sum* or *value* of two thousand dollars.

Section 695, providing for appeals to this court in prize cases, is:

> Where the matter in dispute, exclusive of costs, exceeds the *sum* or *value* of two thousand dollars.

Section 699 is:

> A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the *sum* or *value* in dispute.

Section 702, with reference to writs of error and appeals from Territorial courts, is:

> Where the *value* of the matter in dispute exceeds one thousand dollars; * * * the Territory of Washington, the *value* of the matter in dispute must exceed two thousand dollars, exclusive of costs.

Section 705, with reference to appeals from the Supreme Court of the District of Columbia, is:

> Where the matter in dispute, exclusive of costs, exceeds the *value* of one thousand dollars.

Section 707, allowing appeals from the Court of Claims, is:

> Where the *amount* in controversy exceeds three thousand dollars.

The word "amount" is used throughout the act of 1887 as it is in section 707, showing that where money claims only are the subject of jurisdiction, the words "sum" or "value" are not used, and the word "amount" is.

A fair inference may also be derived from what Congress did not say. If Congress had intended to confer general equitable and admiralty jurisdiction on the Court of Claims and the district and circuit courts in all matters in dispute in which the United States was a party to the record or in interest, why did it not so say, as in section 629 of the Revised Statutes and other similar jurisdictional legislation? The language in such legislation is:

> The circuit courts shall have original jurisdiction, as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, where the *matter in dispute*, exclusive of costs, exceeds the *sum* or *value* of five hundred dollars. * * *
>
> Second. Of all suits in equity where the *matter in dispute*, exclusive of costs, exceeds the *sum* or *value* of five hundred dollars, and the United States are petitioners.

C.

Even if general equity jurisdiction is conferred upon the courts, these bills do not set forth a cause for equitable relief.

The relief sought, in form, in cases Nos. 1102, 1103, and 1482 is for specific performance of alleged contracts for sales of land, with prayer for decrees against the United States to issue patents. A case for equitable relief must set forth a proper subject-matter and a proper party to the cause. The United States can not, under the allegations in these bills, be made a proper party to the subject-matter in the cause. The action is a personal one. The decree is against the person. The process for

its enforcement is one for contempt. Such process could not issue against the United States.

To warrant a decree, the bill must show that the party against whom it is sought has been guilty of some wrong or neglect of duty. The bill sets forth no case of wrong on the part of the United States, nor any neglect of duty. The United States has passed all the laws necessary to secure justice to the defendant. Of itself the Government can not act. It can act only through its properly constituted agents. It has empowered officers to execute fully and justly all the laws relating to the subject. It has appointed and installed officers to perform the duties required by law.

If any wrong or neglect of duty is established by the bill, it is not the wrong or neglect of the United States, but only that of the officers upon whom the duty was by law imposed. A bill in equity can not be sustained against an infant for specific performance on account of personal disability. It can not be sustained where a party can not be judicially compelled to do the act. In Adams on Equity, page 81, the principle is thus stated:

> If the defendant, though able to fulfill his contract, can not be judicially compelled to do so, the jurisdiction of equity is equally at an end.

The reason for this is that where a party against whom a decree is invoked is personally incapable of performing the contract, the personal equitable remedy against such party does not exist. The remedy, where an officer of the Government neglects or refuses to do a mere ministerial duty imposed upon him by law, is *mandamus*. This is

substantially the power invoked in all the cases under consideration, and is the sole power whose exercise is called for in the case of *Drew* vs. *The United States*, No. 1061. But this power as applicable to these cases does not exist.

(1) Because mandamus is an extraordinary *common law remedy*, and is not an equitable one.

> The modern writ of mandamus may be defined as a command issuing from a *common law* court of competent jurisdiction, in the name of the State or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. (High's Extraordinary Legal Remedies, sec. 1.)
>
> In the United States the jurisdiction by mandamus is usually exercised by the courts of general *common law* jurisdiction throughout the different States. (*Ib.*, sec. 29.)

The first section of the act of 1887 as to common law remedies is identical in language with that of the act of 1855, and, as has been shown, that act only applied to money claims.

(2) The nature of the writ forbids its issue directly against the Government, because it is a prerogative writ issued by the sovereign, and if it should be against the sovereign it would be a command from the sovereign to itself; and as the Government itself, independently of its officers, can do no wrong, this would involve an absurdity.

(3) The writ can not issue when the duty to be enforced

involves judgment or discretion in the officer upon whom the duty is imposed.

In the case of *The United States* vs. *Guthrie* (17 How., 304) it is ruled:

> Thus it has been ruled that the only acts to which the power of the courts by mandamus extends are such as are purely ministerial, and with regard to which nothing like judgment or discretion in the performance of his duties is left to the officer, but that wherever the right of judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise.

The courts will not assume control, either by the equitable remedy of injunction, or by mandamus, of the performance of a duty committed to executive officers, so long as the title remains in the United States and the matter is rightfully before them.

These several bills call for an injunction or a mandamus to compel action by the officers having charge of the disposal of the public lands.

Section 441 of the Revised Statutes provides—

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * The public lands, including mines.

Section 453 provides—

> The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, *all* executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands,

> and also such as relate to private land claims, and the issuing of patents for all grants of lands under the authority of the Government.

Section 458 provides:

> All patents issuing from the General Land Office shall be issued in the name of the United States, and signed by the President, and countersigned by the Recorder of the General Land Office, and shall be recorded in the office, in books to be kept for that purpose.

These, with other provisions of the land laws, impose upon the Secretary of the Interior general supervision over the surveying, sale, and patenting of lands. Subject to that supervision, the Commissioner of the General Land Office has imposed on him quasi-judicial duties; he is invested with discretion; and he has power of investigation, for which he is authorized to employ a corps of special officers. No act of his subordinates is final until after he shall have made such investigation as shall satisfy him that there has been a full compliance with the law.

The third section of the act of 1878 (20 Stats., 90) provides:

> And on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon * * *. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

That the papers and testimony must be laid before the Commissioner before the issue of the patent, implies that those papers, and that testimony, before the issue of the

patent, shall be examined and passed upon by him, and if in his judgment, upon the law and the facts, the entryman is not entitled to a patent, it should not be issued. The exercise of this power, and the duty to discharge it, were not intended to be waived, in the act of 1878, but that act was passed as a part of the general land system, and should be so administered.

In the case of *Johnson* vs. *Towsley* (13 Wall., 87) it is ruled:

> This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the Government, and in reference to the proceedings before the officers entrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision.

In the case of *Steel* vs. *Smelting Company* (106 U. S., 450 and 451), in speaking of the Land Department, it is ruled:

> That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassail-

able, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In the case of *Gaines* vs. *Thompson* (7 Wall., 352) it is ruled:

> Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, *after the matter has once passed beyond their control* there exists no power in the courts, by any of its processes to act upon the officer, so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine is therefore as applicable to the writ of *injunction* as it is to the writ of *mandamus*.

In the case of *Frisbie* vs. *Whitney* (9 Wall., 194), referring to settlement, cultivation, and making of entry upon public lands, it is ruled:

> When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with a legal title to the land.

In the case of *Litchfield* vs. *Register and Receiver* (9 Wall., 577), a bill was filed against the Register and Receiver of the Land Office to restrain them from entertain-

ing or acting upon applications for lands claimed by the complainant. This court ruled:

> The principle has been so repeatedly decided in this court that the judiciary can not interfere, either by mandamus or injunction, with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here.

In the case of the *United States* vs. *Schurz* (102 U. S. 396), which was an application for mandamus against the Secretary of the Interior to compel the delivery of a patent for land after it had been regularly signed, sealed, countersigned, and recorded, the court in the opinion sustained the principle above contended for, in the following language:

> Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

In the case of *Sioux City and St. Paul Railroad Company* vs. *The United States* (36 Fed. Rep., 613), which was a case tried in the circuit court of the United States for the northern district of Iowa, and decided in November, 1888, a bill was filed under the act of 1887 to enjoin

the officers of the Land Office from selling or disposing of land alleged to be owned by the claimants. It was demurred to for want of jurisdiction. The demurrer was sustained, Shiras, J., ruling:

> Does the act of March 3, 1887, change the relations of the judicial and departmental branches of the Government in this particular, and confer upon the courts increased jurisdiction in matters of this character? So radical a change in the relations of these branches of the Government can not be supposed to have been intended by Congress, unless it is declared in unmistakable language, and such declaration can not be found in the act in question.

D.

The statute of limitations.

In the case of *The United States* vs. *Drew*, No. 1061, the alleged right, if it ever existed, is barred by the limitation contained in the first section of the act of the 3d of March, 1887, under which this suit was brought. It provides—

> That no suit against the Government of the United States shall be allowed under this act, unless the same shall have been brought within six years *after the right accrued* for which the claim is made.

The limitation started under the act, on the 2d of June, 1858. If a right to the certificates ever accrued to the plaintiff, it vested at that date. Plaintiff's complaint alleges (Rec., p. 3):

> That said right to said indemnity certificates created by the said law of 1858 thereby became a vested right in the said Francisco Adante or his legal representatives.

There is no reservation in the limitation as to rights that would be barred under the act prior to its passage, nor on account of any disability. The remedy provided by the act of 1887 is confined to such claims as were not barred at the time of its passage.

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Office Supreme Court U. S.
FILED.
JAN 2 1889
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM.—1888.

No. 1103.

THE UNITED STATES

Appellant.

vs.

CARRIE JONES.

BRIEF OF APPELLEE.

JAMES C. CARTER,

Of Counsel for Appellee.

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ALBERT B. KING, PRINTER, 19 LIBERTY STREET.
(Telephone, John 875.)

1889.

the courts in cases where the relief demanded was other than the recovery of money.

The Court was of the opinion that the act did confer jurisdiction. and overruled the demurrer.

The petition upon which the hearing was had alleged the value of the land to be not less than $1,000, but an amended petition was filed which stated the value as exceeding $5,000 (Record, p. 11). A like demurrer was again interposed, and it was this which the judgment overruled.

The United States appealed to this Court.

First Point.—The petition sufficiently set forth a *contract* between the United States and Frierson for the sale of lands by the former to the latter, and full performance by Frierson on his part. He thereby became entitled to a *conveyance* of such land in the usual form; and if the transaction had been between private individuals, the right of the purchaser to enforce the execution and delivery by the vendor of a deed would not be doubted. The circumstance that the United States was the seller did not render the *right* to a conveyance less clear, although the purchaser might not have the power to enforce it. Frierson, by reason of the premises, became and was the equitable owner of the land, and then conveyed his title to the present petitioner. The United States hold the naked legal title to the land, and in equity are merely the trustee thereof, with the obligation of transferring it to the petitioner.

Second Point.—Jurisdiction to hear and determine a claim for such a conveyance was conferred upon the Court below by the Act of March 3d, 1887, in the plainest terms. No ground is left for construction or doubt.

1. The claim is upon a *contract with the Government of the United States.*

2. It is a claim in respect of which the petitioner *would be entitled to redress against the United States in a Court of Equity if the United States were suable.* Nothing remained to be done by the purchaser nor by the Government except the performance by the latter of the duty, wholly *ministerial*, of executing and delivering the patent.

3. No claim can be imagined which falls more completely within the class described in the act over which jurisdiction to hear and determine is conferred upon the courts therein named.

Third Point.—It would be to no purpose to say that this act should be *strictly construed.* As already observed, no case for *interpretation* is presented; and no rule, even of the most rigid construction, would suffice to ex-

clude this claim from the class of cases over which jurisdiction is conferred,

Fourth Point.—Whoever undertakes to exclude this claim from the class defined by the act must start with an assumption as broad as the following, namely: That the proposition that a Court should be permitted to hear and determine a claim against the United States for equitable relief, such as the execution of a conveyance of lands, is of such an extraordinary character, and so doubtful in point of expediency, that congress must be presumed not to have authorized such action by any *general* language, however clearly that language may embrace it, and that the authority can be held to have been given only when conferred by express language *specifically* describing such relief. It is respectfully submitted that such an assumption would be an error too gross for any indulgence.

On the contrary, the just method of treating this act is to view is at one calling, if that were at all necesssary, for a liberal interpretation.

1. An obvious distinction should be noticed between *declaring* justice and enforcing it. In suits between private persons both these functions are discharged by the Court, but the first only is its true and proper one.

The second is an executive or administrative office, being the exercise of mere power, and might well enough be performed by independent officers. Reasons of convenience have led to the placing of such officers under the authority of the Court. "The judiciary has no influence over either "the sword or the purse; no direction either "of the strength or the wealth of society; "and can take no active resolution whatever. It may truly be said to have "neither *force* nor *will*, but merely judgment, and must ultimately depend upon "the aid of the executive arm for the efficacious exercise even of its judgments."

The Federalist, No. 78 (Hamilton).
Story on the Con., §§ 1600.

2. The circumstance that these two functions have, in the practice of governments, been entrusted to the same hands has led to the rule in cases between individuals that a court will not assume jurisdiction where it has not the power to enforce its decrees. The offices of declaring and enforcing justice are thus further tied together, but this is not in consequence of any inherent difficulty in an independent discharge of the function of *declaring* justice.

3. In the case of the sovereign, whether under democratic or monarchical rule, justice can not be *enforced* against him "for

who shall command the king?" And there is precisely the same difficulty in commanding the head of a democratic State. The freedom of his person and action is essential to the existence of the state. No compulsion can be employed against him, except to depose him and seat another in his place.

The same reasons go far towards precluding the exercise of force at the instance of a citizen to compel the principal officers of state to submit to the compulsion of a court. The immortal judgment of Marshall in Marbury *vs.* Madison stopped with the declaration that a writ of *mandamus* might go against a cabinet officer to compel the performance of a mere *ministerial* duty imposed by law.

4. It follows as a consequence that whenever the citizen seeks redress for an injury proceeding from the state the office of declaring justice must, in general at least, be exercised *independently*, for the office of enforcing it does not exist. This, however, furnishes no reason why justice in such cases should not be ascertained and declared, for we cannot, or should not, suppose any necessity for enforcing it. To *know* what justice requires from the state to one of its citizens is all that is requisite. That it will be done no doubt should be entertained. The law "presumes that to *know* of any injury and to *redress* it are inseparable in the royal breast."

3 Bl. Com., 255.

5. The act under consideration, and indeed, all prior legislation, conferring jurisdiction and power upon the Court of Claims, are based upon a recognition of the foregoing views. Nowhere is any attempt made to render the judgments of that tribunal judicially *enforceable*. An independent discharge of the function of *declaring* justice is alone provided for. Performance of the decree is left to the legislative and executive departments. To give the judiciary the power of compelling those departments, would destroy their independence, and reduce them to subjection, a result wholly at war with our constitutional system.

It is true that the seventh section of the Act of March 3d, 1863, directs that judgments of the Court of Claims "shall be paid out of any *general* appropriation made by law, for the satisfaction of private claims"; and the obligation to make such payment, is imposed upon the Secretary of the Treasury; but this obligation is imposed upon him by Congress, not by the Court. The Court has no authority to *adjudge* that it be so paid, still less, any authority to enforce such payment by compulsory process. The legislation in this respect simply consists of an appropriation by Congress to pay such claims as the Court of Claims may allow.

Nor is the decision of this Court in the case of Gordon, Admr., *vs.* The United States (2 Wall., 561), opposed in any degree to this view. The decision in that case did not proceed upon the ground that

the determination by a tribunal of a controversy when it had no power to *execute* its determination was not an exercise of judicial power, but upon the ground that when it was still left to an executive department to *review the determination* of the Supreme Court (as the Act of 1863 did leave it), such determination, although an exercise of judicial power, was not a *final* one, and, therefore, not of the character which marks the jurisdiction of this Court. (See United States *vs.* Alire, 6 Wall., 577 United States *vs.* Klein, 13 Wall.. 128, 144. United States *vs.* O'Grady, 22 Wall., 641, 647.)

In the opinion of Mr. Justice Nelson, in the case of United States *vs.* Alire, *supra*, an observation is found which may tend to create misapprehension. The Court, in that case, held that the Court of Claims had no jurisdiction ; and in assigning the reasons, the learned judge said : " We find no provision in any of the statutes requiring a judgment of this character to be obeyed or satisfied." But, certainly, this could be no just ground for the inference that no power was conferred to render such a judgment. For the reasons already indicated, no power could be conferred upon the Court, to compel obedience to or satisfaction of its judgments ; nor was it necessary, in order to render such judgments as complete and effective as they can be made, nor in any statute has any attempt been made to enable the Court to enforce any of its judgments, of whatever description, whether

adjudging the petitioner entitled to a recovery of money, or other relief.

The other reason assigned by the learned Judge for the decision, was the true ground upon which the Court proceeded, namely, that inasmuch as the statute had made provision, in pursuance of which payment or satisfaction of some of its judgments might be obtained (not, indeed, by process of the Court, but by congressional appropriation), and had made no such provision for judgmenis awarding equitable relief, the inference was justified, that power to render judgments of the latter description was not intended to be conferred. We say nothing in this place concerning the soundness of this inference.

6. We need not stop to argue that injuries proceeding from the State *should* be redressed as certainly and promptly as those inflected by private persons. Justice is no respecter of persons. Its obligations are universal and absolute. The ancient maxim that "the king can do no wrong" was never really effective to defeat justice, except in the case where a wrong could not be imputed to ministers or officers, and then only for the purpose of guarding the person of the sovereign.

7. The government in the transaction in question was exercising no function of sovereignty, but simply engaging in the ordi-

nary business of selling property, of which it was the owner. It simply made a contract with one of its citizens. It cannot do this without consenting to be bound by the ordinary rules which govern the conduct of individuals in such transactions. Were it necessary for the government to enforce such contract, it could enter the courts and have the agreement ascertained and declared by judicial methods. To deny the same privilege to the party with whom it deals is a plain denial of justice. How would this comport with the "*nulli negabimus justitiam*" of the Great Charter? "When a government enters into a "contract with an individual, it deposes "as to the matter of the contract, its con- "stitutional authority, and exchanges the "character of legislator for that of a moral "agent, with the same rights and obliga- "tions as an individual" (Hamilton's "Works, Vol. 3, 518).

8. Nor is the practical recognition of the obligation of the State to redress the injuries it may inflict on its citizens, a recent development of civilization. Centuries ago in England the law had provided a forum and a procedure well calculated to afford redress in all cases which were likely to arise. The petition of right (*petition de droit*) and the plea of right (*monstrans de droit*) were modes of redress at common law always open to the subject, and which could be prosecuted in the Court of Chan-

cery on its common law side, or in the Court of Exchequer. (3 Bl. Com., 256).

9. The *procedure* in such cases has, by legislation in recent times, been assimilated to that in cases between subject and subject; (23 and 24 Vic. c. 34); but the jurisdiction was complete before. The seventh action of the act referred to declared that it shall not be construed as giving to the subject a remedy against the Crown in cases where none before existed.

The Bankers' Case, 14 How, St. Tr. 1. Thomas *vs.* The Queen, Law Rep., 10 Q. B. 31. Smith *vs.* Upton, 6 M. and G., 252. (note *a.*)

10. It was, indeed, for a long time the reproach of the government of the United States, and still is, if the contention of the appellant is well founded, that it furnished its citizens with no *judicial* methods by which they could assert just claims against it, and left them with no other means of redress than supplication to executive or legislative power, neither of these agencies having the time, the knowledge, or the means to prosecute the inquiries necessary in order to ascertain justice, and too apt to be moved by caprice or favor.

11. To support the necessity or propriety of

the jurisdiction for which we are contending by an appeal to *prudential* considerations seems almost a surrender of the high ground of *positive right* upon which the argument more properly rests. Such considerations, however, would of themselves suffice to sustain the views for which we are contending.

When courts in which a citizen can assert his claims against the government are denied and Congress entertains his petition for redress, the nature of the task which has to be performed (if Congress discharges its duty) is not thereby changed. It is still a *judicial* function which is to be performed. The *facts* must be ascertained, and the *law* declared. The execution of this function by Congress is a *usurpation* defensible only on the ground that, unless the public duty is thus performed, it will not be performed at all. It involves all the mischiefs which usually attend the exercise of usurped powers, superadded to those which always accompany private legislation—erroneous conclusions arising from haste and neglect, and the injustice of caprice, favor or corruption. A right which must be sought by petition to a legislative body, because there is no court in which it it can be asserted, is but too likely to become the subject of *purchase*. It requires the agency, not of a *bar*, but of a *lobby*.

We must add to this catalogue of mischiefs the others not less flagrant which arise from the neglect of proper legislative duties. The true business of legislation will never

be successfully performed when the time and talents of the legislators are devoted to attention to private claims. This latter consideration was undoubtedly the most influential one which led to the original establishment of the Court of Claims.

12. Seeing, therefore, that the purely *judicial* function of ascertaining facts and pronouncing the law thereon is separable and independent from the office of *enforcing* justice; that whatever of theoretical or practical difficulty which would arise from allowing compulsory process is attached only to the latter function, and not to the former; seeing that the exercise of the former is the plain duty of every civilized state; that it has been clearly recognized from an early period, and provision made for it; that our own Government was long under the just reproach of neglect and failure in the performance of this necessary duty; that the practical mischiefs resulting therefrom had become so flagrant as to move Congress to an endeavor to provide a remedy by establishing the Court of Claims; and that the act under consideration is an obvious effort to enlarge that remedy and make it more effective, we need no longer delay the conclusion that this act should be construed, should any occasion for construction be found, not with rigid parsimony, but with the liberality which is usually and properly extended to *remedial* legis-

lation. When Congress endeavors to perform its duty, and to supply great defects in administration, and to cure the most crying evils, it is the duty of courts to second the endeavor. When a new and beneficial jurisdiction is conferred, the maxim, "*boni judicis est ampliare jurisdictionem*," is most applicable.

Sedgwick on Stat. & Con. Law, 359 *et seq.*

13. In a celebrated case in the British courts concerning the extent of the remedial power which could be exercised under the ancient proceeding of the Petition of Right, the objection was taken that, although relief could be had in cases of dispute concerning lands or chattels, recoveries of money in cases *ex contractu* could not be adjudged. The Court, by placing its decision upon another ground, avoided this objection; but it gave a worthy expression to the spirit of exposition in which such a question should be approached. "We may observe that there is nothing to "secure the crown against committing the "same species of wrong, unconscious and "involuntary wrong, in respect of money, "which founds the subject's right to sue "out his petition when committed in re- "spect to lands, or specific chattels; and "there is an unconquerable repugnance to "the suggestion that the door ought to be "closed aginst all redress or remedy for "such a wrong."

Baron de Bode's Case, 8 Ad. & El., N. S., 208, 273.

14. In the light of this rule of interpretation some objections which the appellants may raise are to be briefly considered.

a. It will not, of course, be now insisted that jurisdiction is not conferred upon the courts named in the act over claims founded upon *equitable* considerations. That view was taken by this Court in interpreting the original act establishing the Court of Claims.

Bonner *vs.* The United States, 9 Wall., 156.

In the opinion in this case the observation is made in respect to rights in equity that "Congress wisely reserved to itself the power to dispose of them." The justice of this observation is (with deference) not fully perceived by the undersigned. If it be proper that justice should be ascertained and declared by judicial methods in respect to *legal* claims against the Government, why is it not equally proper that the same course should be pursued in respect to *equitable* claims? Ought not justice to be done in the one case as well as in the other? Is Congress better fitted to try a suit in equity than a suit at law? Are the evils which are likely to flow from the usurpation of judicial functions by Congress of less magnitude in the case of equitable claims?

But whatever may have been the propriety of such an observation in relation

to the original act creating the Court of Claims, it is certainly not applicable to the legislation under notice. *After* the decision above referred to had been made, Congress *reforms* the phraseology of the first section of its original act, and exhausts the language of extension so as to make the jurisdiction broad enough to embrace every claim against the United States which can be made the subject of judicial cognizance, with the express and sole exception of pensions. It seems impossible to resist the conclusion that it was the intent of the later act to remove the objection which the courts had allowed in respect to the earlier one, and to make the discharge of governmental duty in this respect co extensive with governmental obligation

(*b.*) It may be urged that suits in equity frequently require that several parties be made defendants, and that the act makes no provision for this. But this objection has no application to equitable claims against the government *alone*, and it would be difficult, if not impossible, to make provision for the joining of other defendants in the Court of Claims. It is but a limited jurisdiction which is conferred upon other tribunals. But this obstacle, in most cases at least, is not of great magnitude. The Courts upon which jurisdiction is conferred may separately determine what equitable duty the Gov-

ernment owes to the party before the Court, leaving the rights of that and other parties, as between themselves, to be determined by other tribunals. The case in which some proper defendants cannot be brought into Court is familiar to Courts of Equity, and it often proceeds in the absence of such defendants.

(*c.*) In a case already referred to (United States *vs.* Alire, 6 Wall, 573), an appeal was taken from a determination of the Court of Claims allowing equitable relief. The Court then possessed such powers only as were bestowed by the Acts of 1855 and 1863, and it was held that under those acts no power was conferred to render other judgments than for *money*.

It may be urged that under the Act of 1887 there is no *express* power to render other judgments than for money, and that the provisions in the act last referred to, relating to interest on judgments, apparently assume that *all* judgments are to be for money, and consequently that it must still be held that the power of the Court is limited to the rendition of judgments of that character.

It is not at all necessary, in answer to to this argument, to draw in question the decision referred to; but the undersigned cannot help thinking that a rule of construction somewhat too rigid was adopted. The Act of 1863 confirmed and enlarged the jurisdiction created by

the Act of 1855; and that described a certain class of *claims*, and authorized the Court "to hear and *determine*" them. If the *claim* was for relief equitable in its nature, the *determination* of it authorized by the act, authorized a judgment allowing the claim, if the title to such relief was otherwise made out. How can a *claim* for equitable relief be heard and *determined* unless it be possible to declare that the claimant is entitled to it? And where general jurisdiction to hear and determine is given, it would seem that authority must necessarily be deemed to have been given, to render such judgment as the law requires, unless by some express and unequivocal language, the Court is limited in its award of relief. It would seem as if in the case case referred to, the Court first by *implication* alone reached the conclusion that relief was limited, and then employed that implication to qualify the otherwise unqualified grant of power.

(*d.*) But the act we are now interpreting is of a wholly different character. The terms of the grant of jurisdiction are as broad and emphatic as they can be made. It is impossible not to believe that it proceeded upon a full recognition of the truth that the furnishing of redress by the government in cases of just claims upon it by individuals was a plain governmental obligation, which could not be

discharged except by providing *judicial methods* by which justice should be ascertained and declared; that the creation and furnishing of such methods was at the same time dictated by a prudential regard for the government's own interests in relieving Congress from burdens which it could not carry and which greatly tended to disable it from the discharge of its proper duties; and that the determination was to frame a measure of relief which should be co-extensive with the obligation.

If these were the views which induced the adoption of the measure, how is it possible by distant and doubtful implication to limit the jurisdiction by the line which separates judgment for money from those for other relief? Is the obligation to furnish other relief, when the case requires it less strong? Is Congress better fitted to mould and shape equitable relief than it is to reckon how much money is due? Is the work of determining equitable relief a less inappropriate or burdensome office for the legislative power to perform? Is it accompanied with any greater hazards to the interests of the Government?

The proper answer to all these questions is wrapped up in the just proposition that when Congress has conferred authority upon the Court of Claims "to "hear and determine * * all *claims* "founded upon the Constitution of the "United States, or any law of Congress

"except for pensions, or upon any regu-
"lation of an Executive Department, or
"upon any contract, expressed or im-
"plied with the Government of the
"United States, or for damages, liquid-
"ated or unliquidated, in cases not
"sounding in tort, in respect of which
"claims the party would be entitled to
"redress against the United States either
"in a court of law, equity, or admiralty,
"if the United States were suable;" the plain intention is to render justice in all cases, save the few excepted ones, *by judicial methods* and in the ordinary judicial forms, and that where the Government would be bound to furnish redress to an individual, if the Government *were suable*, it shall be at least *declared* that it is *bound* to furnish that same redress, whatever the nature of it may be.

15. But in the resort to interpretation and construction, were this allowable, it will be found that the above conclusion will only be supported and confirmed.

(*a.*) The broad significance of the word "*claim*" should be noted. It is the largest term known to the law in describing the redress to which a party may be entitled

Worcester's Unabridged Dic. *sub verb.*

United States *vs.* Wilcox, 4 Blatch, 388.
Prigg *vs.* Pennsylvania, 16 Pet., 539, 614, 615.
1 Burrill's Law Dic., 296.

(*b.*) And to *broaden*, rather than limit its already extensive meaning, it is made indifferent whether the claim is one for which a party is entitled to redress in a court of *law*, *equity*, or *admiralty*.

(*c.*) And to make it co-extensive with *right, or cause of action*, it is made to embrace every form of redress which could be asserted against the United States, "if "the United States were suable."

(*d.*) Surely in the face of this manifest effort to embrace all forms of redress, the suggestion that those only were intended which consist in demands for money, must be promptly rejected.

(*e.*) But, more than this, the requirement is made that the petition shall, *inter alia*, set forth "the money *or* other thing claimed." Will it be suggested that the law requires the petition to set forth a demand which it does not intend shall be considered?

(*f.*) Sec. 7 requires that a *judgment* shall be rendered in every case, and if the suit be "in equity or admiralty the Court shall "proceed with the same according to the "rules of such Court."

(*g.*) Nor should the significance of the title be lost sight of. "An Act to provide "for the bringing of suits against the "United States."

(*h.*) In the face of these indications of intent, the single circumstance that money judgments only are directly mentioned is of no significance. It was necessary to mention these for the purpose of securing to claimants the right to interest. This does not follow as of course in the case of Government claims. It was wholly unnecessary to mention other judgments, or to point out any way in which they should be obeyed or satisfied. In the case of a money judgment the function of the *Court* was fully performed when it was rendered. It could not be paid without the action of Congress in making an appropriation. No executive officer could otherwise apply a dollar of the public money to its satisfaction, The raising and appropriation of money is the exclusive function of Congress.

In respect to other things *to be done*, that is, other forms of relief, Congress would have no concern. Such matters

would concern the executive departments alone. It was enough that the Court should declare what the Government should do. The Government was charged with full notice of the declaration, for it is one of the parties to the suit. The doing of the act could not, at least in most instances, be compelled, and there was no intention to furnish means of compulsion in any instance.

We perceive that there is ground for the particular mention of money judgments, while there is silence in respect to others. Obedience to the latter is an immediate duty of the executive departments, without any intervention of Congress; but there is no duty to obey the former until an appropriation is made by Congress. Where such an appropriation is made, money judgments stand precisely like the others. The execution of both are alike an executive duty; but the execution of neither can be enforced.

16. The appellee is the assignor of Frierson, who bought the lands mentioned, in the United States, and paid for them. Either there is some ground of legal justification for withholding the patent, or there is none. If the latter alternative be true, it is a disgraceful wrong that the patent should be withheld; if the former, the question of the sufficiency of such justification is a question of *law;* and it is not fit that that question should be decided by the ignor-

ance or the wisdom of any administrative officer. Nor is it fit that it should be decided by any *legislative* body, or allowed to remain *undecided*. The disposition of that question belongs to a judicial tribunal proceeding in accordance with judicial methods. If, when thus considered, the claim is pronounced just and legal, it is not to be supposed that the administrative officer will fail to yield to it. If he should, it would be at the peril of impeachment.

Lastly.—The judgment appealed from should be affirmed, with costs.

JAMES C. CARTER,
Of Counsel for Appellee.

JAN 29 1889
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888.

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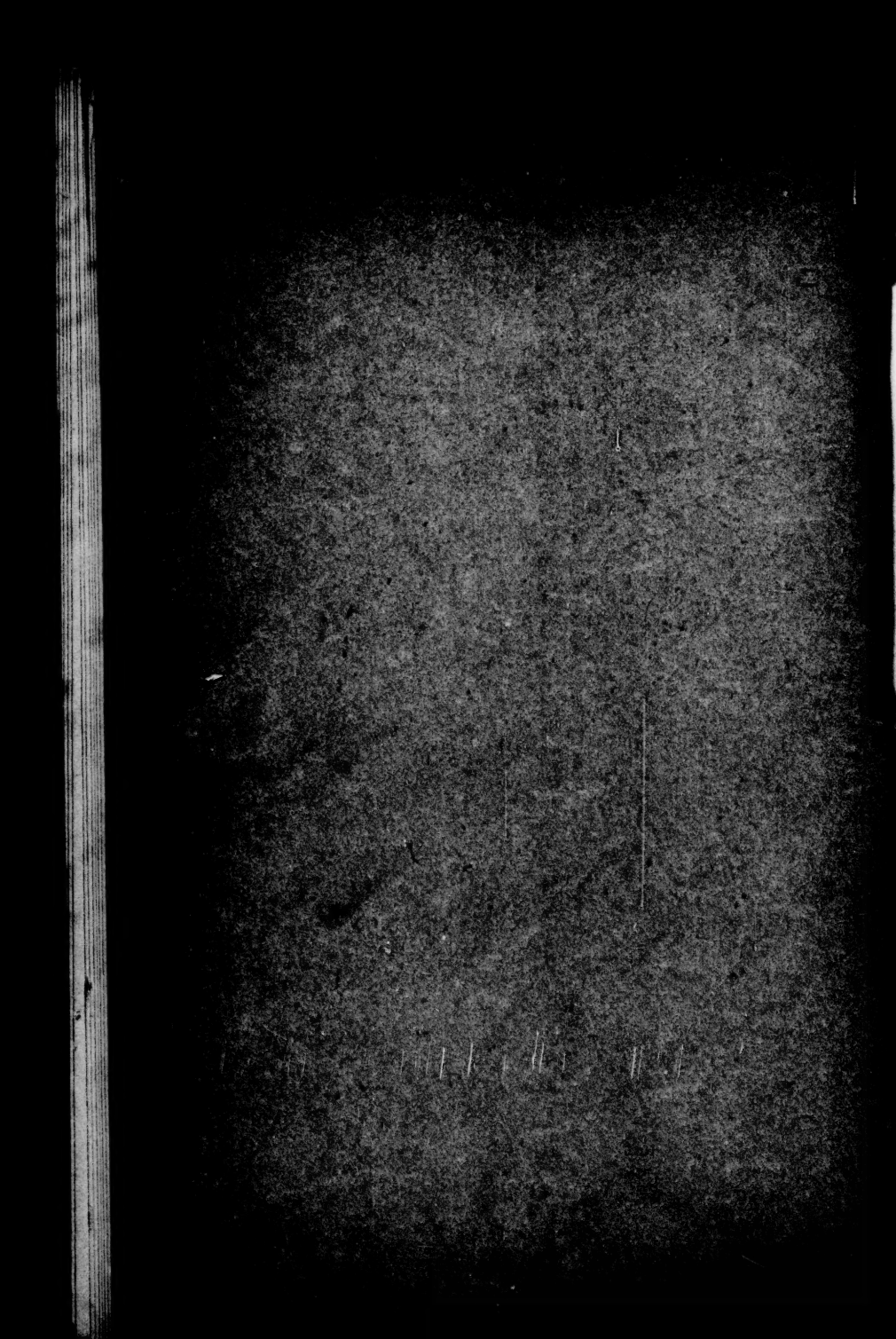

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The undersigned finds, however, upon consulting the briefs filed a few days since by the Government, that another position is to be taken and argued, namely: That if the Court below had jurisdiction of a case in which equitable relief, such as a specific performance, was demanded, there was still no sufficient case presented by the petition for the granting of such relief.

It is the purpose of this paper to make some observations on that position.

First Point. The first ground taken by the counsel for the Government is, that the petition makes out no case against the *United States*, for the reason that if there be any wrong or neglect in the failure or refusal to issue the patent in question, it is the wrong or neglect, not of the United States, but of some officer thereof. It is submitted that this position is wholly erroneous.

I. If the Government has made a contract with the petitioner's assignor for the sale of lands, it came under an obligation to perform that contract. This is its obligation, and it cannot relieve itself from it by intimating that it has passed appropriate laws for giving effect to its engagements, and if there is any refusal or failure to comply with those on the part of its officers, that it is not responsible. The United States is a corporate body, and like any other corporate body, when it enters into a contract with another, is bound to see that contract performed; and any refusal by any of its officers to perform it is its refusal.

The question of the existence of that obligation is one which can be tried only in a suit against the Government which entered into it.

II. It is urged by way of analogy that where a decree for specific performance will not be made, as sometimes it will not be, for the reason that such decree cannot be enforced against the defendant, a court of equity will not

assume jurisdiction. But this analogy has no force. The only thing which makes it impossible to enforce justice against the United States is because the United States is not in general suable. This is the very incapacity which it was the object of the act of 1887 to remove.

Second Point: The next position taken by the learned counsel for the Government appears to be, if we may judge by the authorities to which reference is made, that the question of issuing the patent, or not issuing it, in a case like the present, is lodged in the *discretion* of an executive department, namely, the Department of the Interior, and that its decision upon that question is *final*. This proposition is erroneous.

I. It is undoubtedly true that where any discretionary duty or function is reposed in a public officer—where he is really entrusted with power to determine a matter—his decision is final, unless some remedy is given by way of appeal from it. Such remedy by way of appeal may indeed be had under different forms, as by a notice of an appeal, or by a writ of *certiorari*, and sometimes, perhaps, by *scire facias*, or *mandamus*.

II. It must be very evident that no such discretionary power is entrusted to the Department of the Interior in relation to the issuing of a patent in such cases as the present. The act of June 3, 1878 (20 Stat., 89), provides in the clearest manner for the sale of certain lands therein described. The 2d section of this act provides for the mak-

ing of an application to the Register of the proper district for the purchase of designated tracts, with certain regulations designed to make it sure that the land is of the character which the Government wishes to sell. Section 3d makes provision for the application of notices designed to enable the proper officer to determine whether the land is of the character which the Government proposes to sell, and whether there are any adverse claimants, and if there should be an adverse claimant, a mode is provided by which the conflicting claims can be examined and determined. Possible objections to the sale, of the character thus indicated, being out of the way it, is the clear contemplation of the act that the sale should be made, and the applicant may pay the price of the land to the proper officer, and money thus paid must, by section five, go into the Treasury of the United States. It is provided by the 3d section of the act that "upon payment to the proper "officer of the purchase money of said land, together "with the fees of the Register and Receiver as provided "for in the case of mining claims in the 12th section of the "act approved May 10, 1872, the applicant may be per-"mitted to enter said tract, and, on the transmission to "the General Land Office of the papers and testimony in "the case, *a patent shall issue thereon.*"

Assuming that the process above indicated has been gone through with, and that the money has been paid, no discretion whatever is left in any officer of the Government in respect to the issue of the patent, *the act means that the land should be thus sold;* and the land is thus *sold.*

III. To assert, as the learned counsel in effect does, that there is still a discretion in the Department of the

Interior to issue, or to withhold, the patent, is to assert that no contract for the sale was made, and that the law did not intend that any binding contract for a sale should be made. It is equivalent to the assertion that the granting or withholding the patent rests in the *whim* or *caprice* of the Executive Department; and surely no one can pretend that the existence of a contract, and the reservation to one of the parties of a liberty to perform it or not, are compatible with each other. (Sinking Fund Cases, 99 U. S., 700 and 731).

Third Point. The learned counsel for the Government seem further to insist, somewhat in contradiction of their position last above mentioned, which was that the Department of the Interior has made a decision, and that it is final and conclusive, that the matter is still in the hands of that Department *awaiting decision;* and that while it is in this condition the *Courts* will not interfere. This view is wholly incorrect.

I. Undoubtedly, there is a class of decisions by this Court, of which Johnson *vs.* Towsley (13 Wall., 72) is an instance, in which the reasonable doctrine has been declared that the judiciary will not interfere by mandamus, injunction, or otherwise, with the officers of an Executive Department in the discharge of their duties *while the matter remains in their hands for decision.* This doctrine has no application to the present case. The case made by the petition is that all the steps required to be taken by the statutes for acquisition to title to the lands to be sold have been taken by the purchaser, and nothing remains but the

issuing of the patent; and that the issuance of such patent has been *finally and absolutely refused.* Upon this record the supposition cannot for a moment be indulged that any duty, discretionary or otherwise, prior to the issuing of the patent, remains to be performed by officers of the Government.

II. The position of the Government really amounts to this: that so long as the Department of the Interior refuses or neglects to issue the patent the matter *still remains in the hands* of that Department; and, accordingly, upon the strength of the authorities referred to, no review or other interference with the action of such Department can be had. The upshot of this is, that the contract is in fact annihilated, because it never can be said to be the duty of the Government to issue a patent.

III. It is enough to say, in answer to this, that in respect to the lands in question, of which it was the proprietor, the Government descended from its attitude of sovereignty and proposed to deal with its citizens by way of contract, as one citizen deals with another. It must be bound,—it consents to be bound,—by the ordinary rules which govern the conduct of contracting parties.

IV. There may be reasons why the Government may properly withhold the patent in question. Some fraud may have been practised, or some mistake have occurred in some of the steps taken for the purpose of acquiring the title. In some such way possible reasons may exist which would

justify the Commissioner of the General Land Office in withholding the patent. But this only amounts to saying *that the Government has a defence;* if it has, that defence should have been set up by way of answer. Its *sufficiency* could then have been tried. If the act, which the appellee is seeking the benefit of, means anything, it means that such matters should not be left to the caprice, or the wisdom, or the ignorance, of the executive officers, but should be determined by judicial authority.

JAMES C. CARTER,
Of Counsel for Appellee.

Office Supreme Court U. S.
FILED,
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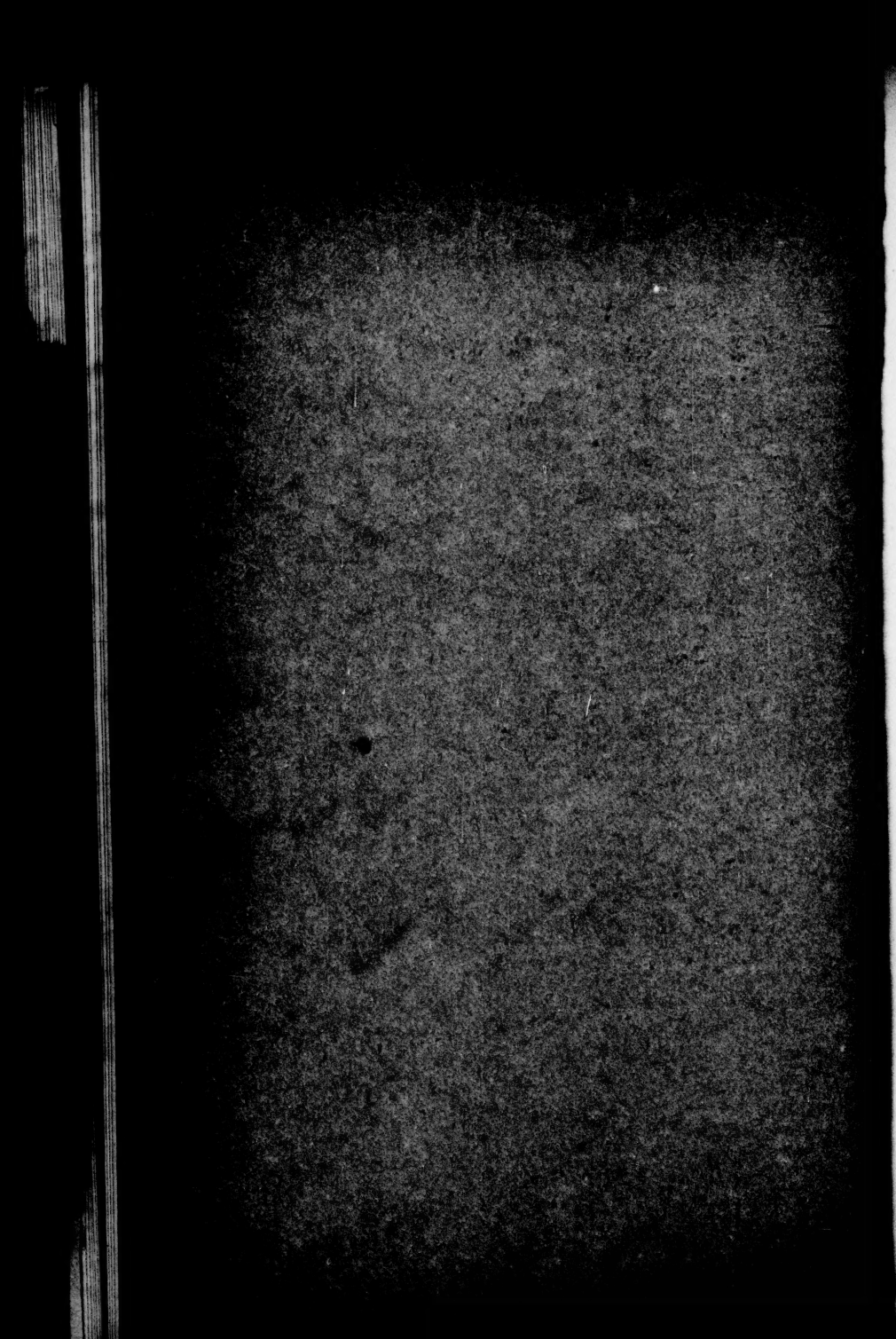

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I. It is undoubtedly true that where any discretionary duty or function is reposed in a public officer—where he is really entrusted with power to determine a matter—his decision is final, unless some remedy is given by way of appeal from it. Such remedy by way of appeal may indeed be had under different forms, as by a notice of an appeal, or by a writ of *certiorari*, and sometimes, perhaps, by *scire facias*, or *mandamus*.

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Assuming that the process above indicated has been gone through with, and that the money has been paid, no discretion whatever is left in any officer of the Government in respect to the issue of the patent, *the act means that the land should be thus sold;* and the land is thus *sold.*

III. To assert, as the learned counsel in effect does, that there is still a discretion in the Department of the

Interior to issue, or to withhold, the patent, is to assert that no contract for the sale was made, and that the law did not intend that any binding contract for a sale should be made. It is equivalent to the assertion that the granting or withholding the patent rests in the *whim* or *caprice* of the Executive Department; and surely no one can pretend that the existence of a contract, and the reservation to one of the parties of a liberty to perform it or not, are compatible with each other. (Sinking Fund Cases, 99 U. S., 700 and 731).

Third Point. The learned counsel for the Government seem further to insist, somewhat in contradiction of their position last above mentioned, which was that the Department of the Interior has made a decision, and that it is final and conclusive, that the matter is still in the hands of that Department *awaiting decision;* and that while it is in this condition the *Courts* will not interfere. This view is wholly incorrect.

I. Undoubtedly, there is a class of decisions by this Court, of which Johnson *vs.* Towsley (13 Wall., 72) is an instance, in which the reasonable doctrine has been declared that the judiciary will not interfere by mandamus, injunction, or otherwise, with the officers of an Executive Department in the discharge of their duties *while the matter remains in their hands for decision.* This doctrine has no application to the present case. The case made by the petition is that all the steps required to be taken by the statutes for acquisition to title to the lands to be sold have been taken by the purchaser; and nothing remains but the

issuing of the patent; and that the issuance of such patent has been *finally and absolutely refused*. Upon this record the supposition cannot for a moment be indulged that any duty, discretionary or otherwise, prior to the issuing of the patent, remains to be performed by officers of the Government.

II. The position of the Government really amounts to this: that so long as the Department of the Interior refuses or neglects to issue the patent the matter *still remains in the hands* of that Department; and, accordingly, upon the strength of the authorities referred to, no review or other interference with the action of such Department can be had. The upshot of this is, that the contract is in fact annihilated, because it never can be said to be the duty of the Government to issue a patent.

III. It is enough to say, in answer to this, that in respect to the lands in question, of which it was the proprietor, the Government descended from its attitude of sovereignty and proposed to deal with its citizens by way of contract, as one citizen deals with another. It must be bound,—it consents to be bound,—by the ordinary rules which govern the conduct of contracting parties.

IV. There may be reasons why the Government may properly withhold the patent in question. Some fraud may have been practised, or some mistake have occurred in some of the steps taken for the purpose of acquiring the title. In some such way possible reasons may exist which would

justify the Commissioner of the General Land Office in withholding the patent. But this only amounts to saying *that the Government has a defence;* if it has, that defence should have been set up by way of answer. Its *sufficiency* could then have been tried. If the act, which the appellee is seeking the benefit of, means anything, it means that such matters should not be left to the caprice, or the wisdom, or the ignorance, of the executive officers, but should be determined by judicial authority.

JAMES C. CARTER,
Of Counsel for Appellee.

IN THE

Supreme Court of the United States.

October Term 1888.

THE UNITED STATES, Appellant,
vs.
CARRIE JONES. } No. 1103.

Appeal from the Circuit Court of the United States for the District of Oregon.

Motion to Advance.

Now comes the appellant, by A. H. Garland, Attorney-General, and moves the court to advance the above-entitled cause for the reasons more fully hereinafter stated.

This suit was brought by Carrie Jones against the United States in the United States Circuit Court for the District of Oregon, under the act of Congress of March 3d, 1887 (24 Stats., 505), entitled "An act to provide for the bringing of suits against the Government of the United States," to obtain a decree requiring the Government of the United States to issue a patent for a tract of land in Oregon, containing 160 acres.

It is alleged by the plaintiff in her petition (Rec., p. 1, *et seq.*) that the land in controversy was public land of

the United States, and subject to entry under the act of June 3d, 1878, for the sale of timber lands in Oregon and other Pacific States (20 Stats., 89), "and was not fit for agriculture, but was chiefly valuable for the timber thereon."

That on June 21st, 1883, one John R. Frierson, having complied with the requirements of said act so as to entitle him to pay for and purchase the land, did purchase the same at the United States Land Office at Oregon City, and did then and there pay the Receiver of the said land office $400, for the United States, for said land, being at the rate of $2.50 per acre; and that thereupon the Receiver gave said Frierson a receipt and certificate for such payment.

That on June 26th, 1883, Frierson, for a valuable consideration, sold and assigned said certificate to the petitioner, and afterwards made a deed for the land.

That the United States has kept the $400 paid for the land, and now refuses to issue a patent for the same, and denies that the plaintiff has any interest whatsoever in the land purchased by Frierson, and by him sold to her.

The prayer of the petition is that the court will decree that a patent for said land issue to said Frierson, and that the benefit of the same enure to petitioner.

The defendant appeared by the United States District Attorney and demurred to the petition for several causes; but all are in effect that the Circuit Court had not jurisdiction of the subject-matter of the suit within the purview of the act of March 3d, 1887.

The Circuit Court overruled the demurrer, and the United States, declining to further answer, stood upon the demurrer; whereupon a decree was entered in favor of petitioner as prayed for in the petition, from which decree the United States have appealed to this court.

The case involves a construction of the act of March 3d, 1887, whether a suit can be maintained for the

specific performance of a contract against the United States where the Government has sold timber lands under the act of June 3d, 1878, received the money paid therefor, and refuses to issue a patent for the land, and denies that the purchaser or his vendee has any interest in the land.

From the reports of the United States District Attorney in the State of Oregon to the Department of Justice, it appears that there are many cases in that State similar to this—not less than one hundred. There are some in which decrees have already been entered against the United States to the same effect as in the case of Carrie Jones against the United States. Many other similar suits, as the Department of Justice is informed, will probably be brought by claimants of timber lands in the States of California, Oregon, Nevada, and in Washington and Idaho Territories. These cases will arise under the construction of the Timber Act of June 3d, 1878, by Hon. Wm. A. Sparks, late Commissioner of the General Land Office, whereby a large number of timber entries are to be cancelled on the ground that the lands so entered, although they may be more valuable for timber, yet can be made agricultural lands by clearing off the timber thereon.

Whereby it appears this case involves a matter of such general public interest an early decision should be had.

Wherefore, &c., &c.,

A. H. GARLAND,
Attorney-General.

Office Supreme Court U. S.
FILED,
JAN 28 1889
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, *Plaintiffs in Error,*

vs.

HARRISON C. DREW, *Defendant in Error.*

No. 1061.

Writ of Error to the Circuit Court of the United States for the Western District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

JAMES L. BRADFORD,
ALBERT H. LEONARD,
Attorneys for Petitioner.

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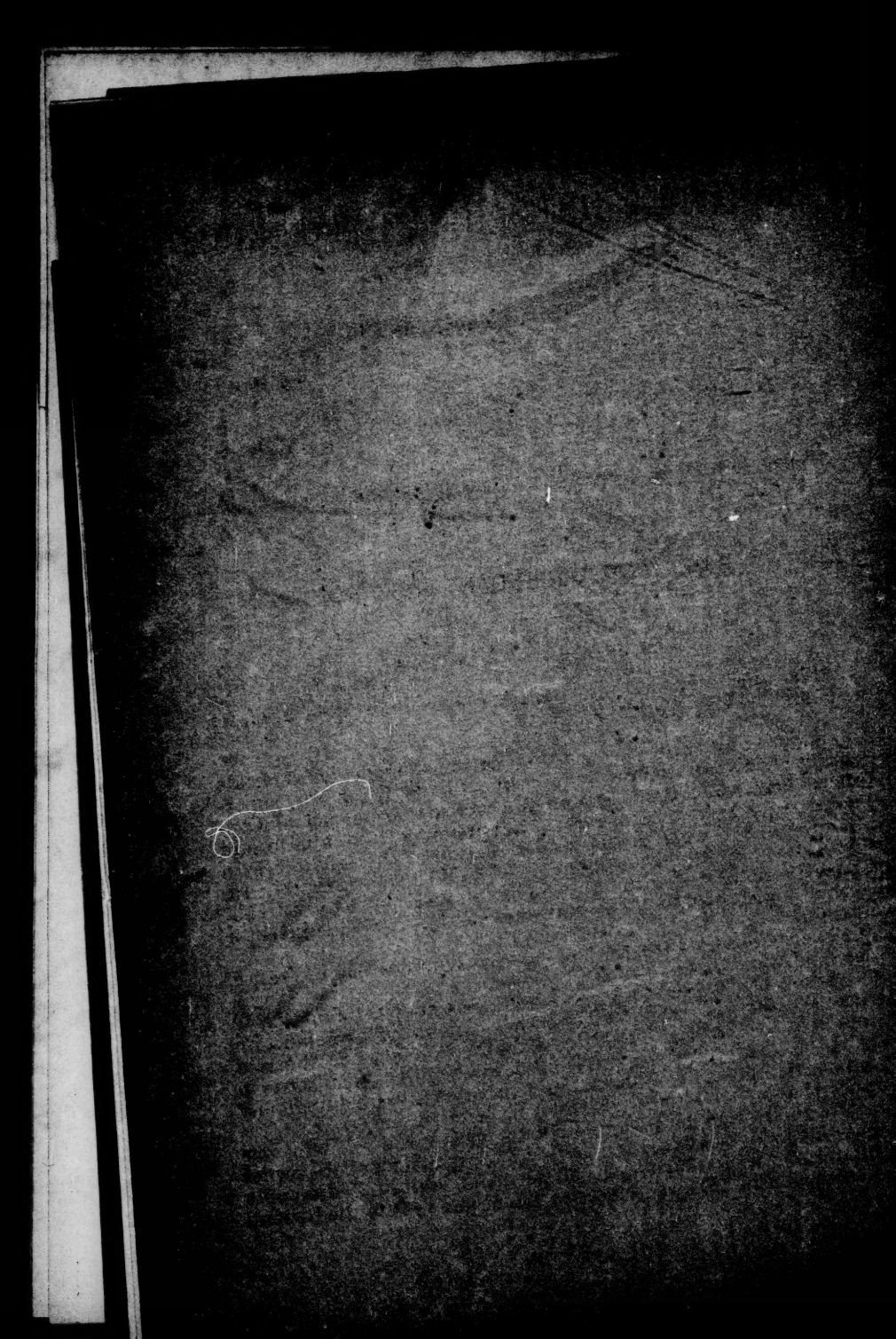

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BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Plaintiffs in error not having stated the case in their brief, we submit the following:

Spain, while in possession of Louisiana, made an inchoate grant of land, of 30 arpents front by 40 in depth, or 1200 superficial arpents, to Francisco Adante, who, under the act of Congress of 11 May, 1820, (3 Stats., 573,) presented his claim to said land and his proof, to the proper register of the land office in Louisiana, by whom, on January 1st, 1821, it was favorably reported to Congress, with other claims, and was, by act of 28 February, 1823, (3 Stats., 727,) confirmed to him, and his heirs or assigns.

The claim was never located by survey under Spain, France, or the United States.

By act of Congress of June 2, 1858, section 3, (11 Stats., 294,) it was made the duty of the surveyor general of Louisiana, on proof to his satisfaction of the above facts, to issue to the said Adante, or his proper representative, indemnity land scrip in satisfaction of said claim, which scrip could be located upon any public lands liable to private entry at $1.25 per acre.

No application by the owner of the whole of said claim was ever made to the surveyor general under said act, but the owner of an interest of three-fourths of the claim (Record, 9) did apply to him, and in 1871 said officer prepared and sent to the General

Land Office for approval scrip for said interest, which the commission, in 1872, cancelled, on the sole ground that the law did not authorize the issue of certificates on a part of a claim. (Record, 9.) That in 1886 the title to the whole claim was acquired at sheriff's sale, (Record, 8,) and the purchaser afterwards conveyed it by deed to the petitioner in this suit, who, on the 26th March, 1887, brought suit, in the Circuit Court for the Western District of Louisiana, under the act of March 3d, 1887, providing for bringing suits against the Government.

The United States pleaded to the jurisdiction, setting forth 7 grounds of plea, (Record, 6,) which plea was referred to the merits, and an answer, being a general denial, having been filed, (Record, 7,) the plea and answer were argued together, and the case taken under advisement. On June 9, 1888, the court found the special facts and conclusions of law, (Record, 7–10,) and gave judgment for plaintiff. (Record, 10.) The judgment is brought here for review, by writ of error, sued out by the United States.

We understand the assignment of errors are the following:

1st. That the 2nd proviso to section 1, of the act of 1887, denies jurisdiction in this claim because the right accrued more than six years before the passage of the act.

2nd. That none but monied judgments can be rendered by the courts under the law.

3rd. That the suit is a mandamus suit against the Surveyor General, who has not been made a party or cited.

The questions involved and assigned as error in the brief of the plaintiff in error arise on the plea to the jurisdiction of the circuit court. (Record, p. 6.) Of the several grounds on which the plea rests we shall first notice the 4th. It involves the construction of the second proviso to the 1st section of the act of March 3, 1887, under which this suit is brought. (24 Stats., 505.) It is this:

"*Provided*, That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

We think upon the interpretation of this language by the court this case will turn. And the act, revealing in many re-

spects want of care in its passage, presents, it is believed, no other clause of greater difficulty. It cannot be construed as a limitation of a pre-existing right of action, for in the mass of cases contemplated by the act there could be no such prior right of action to limit. Before a right to sue the Government in its own courts can be barred or limited such right must have once existed, and here the law itself grants the right for the first time. Nor can it be regarded as a limitation upon the general description of claims which the language preceding it declared might be prosecuted in the Court of Claims. Such claims are there described with regard to their nature and subject-matter in both affirmative and negative terms, and the exceptions are there declared in apt and natural language immediately following the enumeration, whereas the proviso now under consideration does not describe any claims at all, but is levelled solely at actions or suits to enforce claims. Such actions, when instituted, must be to enforce claims in which the right of property accrued within six years before the suit is brought. The preceding part of section 1 having, by descriptive language applicable to the nature and character of the claims, enumerated those intended to be submitted to judicial cognizance, followed by other descriptive language excluding from such cognizance other descriptions of claims, it is not reasonable to construe the proviso, separated as it is by foreign matter, as still speaking the same idea of exception and exclusion. It is not reasonable to think that after the labored enumeration of causes contained in section 1, which are plainly declared within the judicial power, and after the careful deduction from the mass of other descriptions of cases not deemed expedient or wise to submit to that power, that Congress then, in a separate and disconnected provision, intended a still further limitation, which would, if construed literally, exclude nearly the entire mass of claims embraced in the prior enumeration.

The contention of the Government is that the proviso is retroactive, and was intended to deny jurisdiction in all cases of whatsoever nature as to character and subject-matter where the right of property accrued more than six years before the date of the law. We think, having due regard to the evil the law was designed to meet and the remedy contemplated by its provisions, that the intention of Congress was to deny jurisdiction in suits founded on rights of property accruing after the passage of the law unless such suits were brought within six years from the time said rights of property accrued.

If the Government's construction is right and ours wrong, then the other proviso to section 1, denying jurisdiction in war claims, is surplusage. For all of such claims accrued far more than six years prior to the date of the act—probably the mass of them

about twenty-five years before. Hence, as to them, the 2d proviso, if intended to operate retroactively, would be an absolute bar, rendering the special provision unnecessary.

Again: the 1st proviso also, in studied language, denies jurisdiction in suits brought to enforce claims, which, before the date of the act, had been "rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." This, though not necessarily limited to claims arising more than six years before the law, is certainly not exclusive of such claims, and may reasonably be held to include them as well as those arising withing the six years next before its date. But as to claims arising more than six years before, and which by this language are excluded because rejected or reported against by a court, department, &c., they certainly required no other provision to exclude them from judicial cognizance. But if the 2d proviso is to sustain the meaning imputed to it by the Government it certainly amounts to an additional exclusion. Hence, it would follow that the special exclusion of war claims by the first proviso was surplusage as to all of such claims, and the additional exclusion of claims rejected or reported against, &c., was also surplusage as to the mass of those claims. For it is historic, and was well known to Congress at the time, that the great mass of claims affected by adverse rejection or report had accrued far more than six years before the act. They were known, like war claims, to have accrued many years before.

Again: the Government's construction creates an incongruity, if not a conflict, between the proviso and section 3 of the act. The proviso affects *all* suits under the act. It affects as well the special description of suits provided for in section 3 as the general descriptions of suits contemplated in section 1. But it is plain, from the structure of section 3, that these special suits were intended to afford relief to persons affected by transactions with the Government of long standing. The reference to persons who *had* held office or agency under the Government, under which it *had* been claimed that an indebtedness *had* arisen and *yet existed*, leaves no doubt on this point. Indeed, the conditions provided in the section, that before suit could be filed the plaintiff or his principal, &c., should first have "applied to the proper department, * * * requesting that the account, * * * be adjusted and settled, and stating that *three years* have elapsed," &c., and that it yet remained unsettled and not sued on by the Government, are totally inconsistent with the idea that the transactions thus intended to be adjusted must have arisen within six years before the passage of the act.

It is historic that the mass of the unadjusted accounts contemplated by this section arose out of the accidents and exigencies

incidental to the civil war, and the vast and often loose transactions immediately following it. If suits under this section are to be confined to cases of indebtedness arising after the act and those arising within six years before it, it is safe to say the latter would be but an insignificant number as compared with those constituting the evil evidently in the mind of the legislature.

The court can take notice of this contemporaneous and departmental status, as well as the existence of the great number of miscellaneous claims pending in the departments and before Congress before the passage of the law and within the eye of the legislature: Preston *vs.* Browder, 1 Wheat., 115; United States *vs.* Union Pacific R. R. Co., 91 U. S., 72; Katzenberger *vs.* Aberdeen, 16 Fed. Rep'r, 745.

"No doubt the words of a law are generally to have a controlling effect upon its construction; but the interpretation of those words is often to be sought from the surrounding circumstances and preceding history." (Siemens *vs.* Sellers, 123 U. S., 285.)

Having thus shown that the 2d proviso to section 1, if read as proposed by the Government, would be inconsistent with section 3, and would render the clause excluding war claims in section 1 surplusage, we submit that the rules justify the court in adopting a construction that will render all these provisions harmonious.

The law being purely remedial, designed to aid the Government and large numbers of persons in judicially determining controversies, as to which there were before no remedies, or defective ones, is entitled to a liberal construction which will advance the remedy and suppress the mischief.

"Section 1594, Rev. Stats., authorizing the transfer of a retired officer of the Navy from the furlough to the retired pay-list, being intended to afford relief from the consequences of the findings of retiring boards, should be construed liberally." (United States *vs.* Burchard, 125 U. S., 177.)

In Telegraph Co. *vs.* Eyser, (19 Wal., 427,) the court say, construing section 11, of the act of June 1, 1872, extending the time within which *supersedeas* bonds might be given:

"These provisions are remedial, and, therefore, to be construed liberally. So far as there is any conflict with the pre-existing rules, the latter must yield. The intention of the law-maker constitutes the law. What is clearly implied in a statute is as effectual as what is expressed."

In United States *vs.* Freeman, (3 How., 264 and 265,) some of the rules applicable to this case are stated, to which attention is invited.

In Stewart *vs.* Kahn, (11 Wal., 504,) arising under the act of 11 June, 1864, (13 Stats., 123,) limiting the time within which actions might be brought against residents of States in rebellion, the court said:

"The statute is a remedial one, and should be construed liberally to carry out the wise and salutary purposes of its enactment."

The different constructions contended for by the parties to this suit, as to the six years' limitation intended by the 2d proviso to section 1, suggests the enquiry: Did Congress in this statute, so far in advance of those defining the jurisdiction of the Court of Claims in the privileges extended to the citizen having demands against his government, intend a harsher rule of limitation as to the time within which such demands should be brought, than was intended in the other statutes?

The act of 1855, creating the Court of Claims, designed, as the debates and history of the times show, to afford relief to large classes of claimants, and to Congress and the departments, contemplated no limitation at all as to the time within which any claim, whose subject-matter brought it within the jurisdiction, should be put in suit. The evil being the past accumulation of large numbers of claims, involving questions fit for determination by judicial courts, the remedy proposed would have fallen far short of that evil if any period of time anterior to the act had been prescribed within which claims must have accrued. Hence the act prescribed none. But after it had been in operation for eight years, within which time it was just to assume that all persons having fair demands against the Government had filed them before the court, a limitation was first established. It was contained in section 10, of the act of March 3, 1863. (12 Stats., 765.) It reads thus:

"That every claim against the United States, *cognizable by the Court of Claims*, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrued: *Provided*, That claims *which have accrued six years before the passage of this act* shall not be barred, if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided further*," &c., &c.

This limitation still exists and is carried into the Revised Statutes as sec. 1069. Now here, in adopting a limitation, which

by its terms applied to claims which had accrued before its date or before the date of the act of 1855, care is employed to save such of those claims as the six-years' bar would otherwise have defeated by allowing them three years after the act in which to be put in suit. A quarter of a century rolls on and brings with it a necessity for extending the jurisdiction of this court far beyond that embodied in these acts of 1855 and 1863, and later acts, and in the law making the extension we find a similar limitation, but without the clause contained in the former saving claims which had accrued more than six years before its date. The former was a limitation *on the right of action* given by the act of 1855, so far as that limitation affected claims which had accrued before 1863. The latter, if any limitation at all on claims accrued before its date, 1887, must be a limitation on a right of action that never arose until the act was passed! But how could a right of action which never existed be limited? If the act of 1887 gave a right of action for the first time in a given case or class, or description of cases, such right could be limited. For after the passage of the act the right would be *in esse* and capable of limitation. As to such rights of action, if claimants having the court open to them, suffered six years to pass without suit, it was consistent with sound principles, and the laws of most of the States as to personal actions, that they should suffer the penalty of such laches. But it was inconsistent with both and at war with the otherwise liberal spirit pervading the act of 1887 that any limitation on a right of action then for the first time given should be prescribed, except as the penalty for laches. And as no laches were predicable of a case or cases not suable until the act made them so, it follows that the limitation was aimed at claims accruing after the date of the law and not those accruing before, and as to which there was no right of action before its enactment.

In this suit of Drew *vs.* The United States, therefore, in which the right of action in a judicial court did not arise until the act of 1887 conferred it, it is an abuse of terms to hold that the proviso to section 1 can be a limitation or a bar until six years shall have elapsed in which suit might be brought. Had the present suit been filed after the expiration of six years from the passage of the law then this proviso would be a bar to or limitation on the right of action. But until the claimant shall have slept six years on *a right of action* laches cannot be imputed to him at all, which brings us back to the view announced at the beginning of this brief, viz., that the proviso is no limitation as to claims accruing before the passage of the law.

Again: we hold these propositions to be self-evident:

1st. That as to claims founded on acts of Congress, (except for pensions), or regulations of executive departments, or upon contracts, expressed or implied, the first section of the act of 1887 is simply a regrant of the old jurisdiction of the Court of Claims existing before its enactment.

2d. That as to the other fields of jurisdiction carved out by section 1, such as claims arising under the Constitution, and in which the claimant would, if a citizen were defendant, be entitled to relief in law, equity, or admiralty, the section is an enlargement of that jurisdiction and extends it to cases not before within it.

3d. That the test by which the jurisdiction of the circuit and district courts is to be ascertained in a given case is the fact that jurisdiction in such case exists in the Court of Claims under section 1, and that the thing in controversy does not exceed in value ten thousand dollars.

Now, as to claims within the old jurisdiction of the court, as to which section 1 is a regrant or declaration of existing jurisdiction, it is plain that the fundamental law of that court had a settled, well-known rule of limitation on the right of action, viz., the six years fixed in the act of 1863 and existing when the act of 1887 was passed. Hence, the proviso should not be construed to intend a new or different rule as to *such* claims. But if it is not applied to them, then it can only be applied, as in reason and justice it only should be, to the other descriptions of claims, superadded to the descriptions formerly cognizable by the court.

Now, we have seen that the test of jurisdiction in the circuit and district courts is the fact of jurisdiction in the Court of Claims, and that the amount of the claim does not exceed $10,000. In other words, if any claim sued on in the circuit or district courts can be defeated by the six years' limitation, it is because it would have been defeated by such limitation if the suit had been filed in the Court of Claims. But we have seen that in the Court of Claim the six years' limitation first prescribed in the act of 1863 and continued in the Revised Statutes, section 1069, is a limitation on a *right of action previously conferred by law.* So that when the act of 1887 was passed there was no such thing in the Court of Claims as a limitation save where a right to sue had been conferred by statute and the claimant had failed to exercise the right within six years from the time when he first might have done so.

Suppose, to illustrate our argument, that our suit brought by H. C. Drew had been filed March 26, 1887, in the Court of Claims instead of the circuit court, and that on the same day another suit had been filed in the Court of Claims to enforce a claim

which had accrued six years and a day before and which was cognizable by the court under the old jurisdiction as it existed before the act of 1887.

It is plain that the latter suit would be defeated by the limitation of six years *because the court could have taken cognizance of it at any time within that period.* And we are now told, in effect by counsel for the Government, that although Drew could not sue before the act of 1887 conferred the right, (granting that it did so), and although he sued so soon thereafter as he could, that the same limitation would defeat him also. If it would, and this court so applies it, the application must rest on principles other than those on which past legislation has founded penalties due to laches, stale claims, prescription of remedies, and the like.

In the act of 1863 we have seen that the limitation, then for the first time applied to remedies prosecuted in the Court of Claims, was confined to suits *cognizable by the court*, and so far is it applied to claims which had then accrued to such as *had been cognizable* since 1855. And even as to them a saving clause was inserted, in harmony with reason and justice, that claims which had accrued more than six years before, might be put in suit within three years after the act. If, therefore, the provision question was intended by Congress to have the same effect upon the new descriptions of claims engrafted on the old jurisdiction by the act of 1887 as the limitation in the act of 1863 had, and still has, on the claims within such old jurisdiction, then why is it that Congress omitted so important and just a provision of the old law as the saving clause referred to? There was the greater reason for it in the new than in the old statute. In the old claimants had had six years' right of action, and three years more were given. In the new no right of action existed before the date of the law, and if the contention of the Government is well founded, none was created by it in claims arising more than six years before its passage. A brief view of the causes which induced Congress to pass the law must defeat this construction, for if it prevails it is safe to say that nine-tenths of the unsettled claims existing at its date will remain subjects of embarrassment to Congress and the departments. In other words, nine-tenths of such claims originated more than six years before the date of the law, and hence could not be settled under its salutary provisions.

In the report of the Senate Committee on Claims, No. 888, 47th Congress, 2d session, dated December 20th, 1882, on the bill which passed March 3, 1883, (22 Stats., 485,) popularly known as the "Bowman Act," it was said:

"The docket of the Committee of Claims of the last Congress contained 1,048 cases, and that of the committee of the present

Congress already contains nearly 1,000. It is obvious that comparatively few of these cases can be reached for action even in committee."

In another place the committee say:

"It may be fairly stated that honest claims against ths Government requiring an act of Congress are worth very little, if anything. No man acting on business principles and as a business matter would be willing to pay much for such a claim or consider it of any commercial value. In session after session and in Congress after Congress and year after year claimants clamor for payment, grow old in the struggle for it, and they and their heirs after them continue to beseige Congress, in the usually vain hope that at last they may receive their honest dues. *One great cause of this unjust and illegal denial of justice to claimants is the immense mass of business of this nature pressing upon a Congress already overburdened with public matters.*" * * *

The Committee on the Judiciary of the House of Representatives, 49th Congress, 1st session, (being report No. 1077, of March 17, 1886,) in reporting the bill which afterwards became the act of March 3, 1887, said:

"The importance of some comprehensive measure by which claims against the United States may be heard and determined before courts of justice has long pressed upon the consideration of Congress. In the 45th and 46th Congress the Committee on Civil Service Reform made full reports on the subject, in which the recommendation of the Secretary of the Treasury in December, 1878, and December, 1879, are referred to, and also the cases decided in the Court of Claims and the Supreme Court in which views of the question were taken which commend themselves to the highest consideration of the country."

The committee then summarized the then existing jurisdiction of the Court of Claims and the good it had accomplished, and added:

"The history of this legislation and its results have been given to show how much benefit has been done in the satisfactory decision of claims against the Government and in relief of the Congress. But it has long been felt that the benefits could be made much greater *by extending* the jurisdiction of the court. By confining it to claims under a law of the United States, regulations of departments, and to cases of contracts, expressed and implied, there is still a *large class* of cases, in equity, in admi-

ralty, and in tortions acts of the Government, through its agents, which are left to Congress, for which a court of justice is better fitted to attain the right between the litigants."

In these extracts, and they are but a line in the history of the times, it is too plain that in passing the act the committee and Congress looked at things around them with a "ray turned back upon the past." They knew the past, but not the future. They legislated for a past evil. The references to the reports of the Secretary of the Treasury so far back as 1878 and 1879 and to those of the Committee on Civil Service in the 45th and 46th Congresses, (expiring March 4th, 1879 and 1881,) clearly show they had in view a condition of things that existed at those times, and not simply at a time within six years anterior to the act.

The next error assigned is founded on the assumption that the act of 1887 does not vest authority in the Court of Claims to hear and determine cases involving other than monied demands. We submit that this view of the law is too narrow and overlooks the mischief it was intended to remedy and the language employed. In United States *vs.* Alire, 6 Wal., 575, and Gordon *vs.* United States, 2 Wal., 561, and in many later cases, it was well settled that the jurisdiction of the Court of Claims under the act of 1855 was limited to claims for the payment of money. But this was not because other claims were necessarily excluded by the language "claims founded on any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States," (10 Stats., 612,) but because of this language in section 7:

"And said court shall prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect; and two or more cases may be embraced in the same bill *where the separate amount proposed to be allowed in each case shall be less than one thousand dollars.*"

This was necessarily a limitation of the general words above quoted, and avoided the inference, deducible from their comprehensive meaning, that they were intended to include claims in which other than monied judgments were sought.

Similar language is used in section 1 of the act of 1887, viz:

"All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regula-

tion of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort," &c.

But there is no similar language narrowing the meaning of these words. On the contrary, section 5 affords the most conclusive proof that Congress intended this general description of claims in section 1 should be as broad as the mischief the law was intended to remedy. After directing how and where suits should be commenced, the section declares:

"Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, *the money or other thing claimed*, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law."

Argument cannot strengthen these words. True, they are not contained in the clause or clauses conferring or denying jurisdiction, and if in conflict with such clauses would be inoperative. But they are not in conflict with the general description quoted from the first section, but afford light by which to understand the sense in which Congress used it. Had the language been, "*the money or any other thing claimed, and praying the court for a judgment or decree upon the facts and law*," it might be inferred that the "any other thing claimed" referred to the "liquidated or unliquidated damages" contemplated by section 1. But, as if to remove this possible doubt, the section goes on, in the same breath, to specify, in clear words, such damages also; thus, by every rule of construction applicable to statutes, declaring in effect that the "*other* thing claimed" was not money or damages, whatever else it might be.

If it be replied, that by section 10 the judgments are to bear interest at the rate of 4 per centum until an *appropriation for payment* be made, we rejoin, that this provision is limited to suits arising in the circuit and district courts, and was merely intended, where their final judgments were for money, to allow as to them the rule of interest which, by the well-settled law and practice of the Court of Claims, (R. S., 1090, 1091,) was allowable on its judgments. The only difference is that the old law gave 5 per centum from demand of payment at the Treasury, while the new law gives 4 per centum from date of final judgment.

If, therefore, this provision, as to payment of interest in section 10, is to be understood as denying to the circuit and district courts, to which alone it applies, authority to hear and determine suits which cannot ripen into monied judgments, and the denial rests

solely on such provision, it would follow that the Court of Claims, not being thus restricted, might exercise the larger jurisdiction conferred by section 1, and as interpreted by the enlarging language we have quoted from section 5. But section 2 gives the circuit and district courts *concurrent* authority with the Court of Claims in the cases specified in it. Hence, we cannot construe section 10 as denying to such courts any jurisdiction, as to subject-matter, conferred by the body of the act upon the Court of Claims. If the Court of Claims has authority to hear and determine in the given case, section 2 leaves no doubt that the circuit and district courts have like authority, if the value of the thing claimed is less than $10,000 and $1,000, respectively.

It seems plain that sections 2, 5, 6, 7, and 10 relate only to the circuit and district courts and to proceedings in them; and for the good reason that when the law was enacted the Court of Claims possessed a well-settled and accurately-defined code of procedure, the growth of 32 years of experience under the various laws granting, defining, and limiting its authority, which code needed no amendment to adapt the practice of that court to the proper determination of the new cases to which its jurisdiction was extended by the act. The case was different with the circuit and district courts, and hence these sections should be understood as limited to them and as moulding their practice in cases between individuals, to suit the new and peculiar jurisdiction conferred upon them for the first time by the act.

The only remaining assignment of error is that the suit is in the nature of a mandamus against the surveyor general of Louisiana, and that the same cannot be maintained because he was not joined as a party defendant. This objection overlooks the fact that no judgment had been obtained before the filing of the suit which that officer was bound to obey, and that his duty under section 3 of the act of June 2, 1858, (11 Stats., 294,) is not such as the writ of mandamus can enforce the performance of. It is useless to multiply authorities on so well settled a subject. See the leading case of United States *vs.* Schurz, 12 Otto, 392, where they are all reviewed. See the following:

Marbury *vs.* Madison, 1 Cranch, 137.
Kendall *vs.* United States, 12 Pet., 524.
United States *vs.* Seaman, 17 How., 225.
United States *vs.* Guthrie, 17 How., 284.
Secretary *vs.* McGarrahan, 9 Wal., 298.

"A mandamus will not issue to compel the Commissioner of the General Land Office to cause a patent to be prepared, signed, countersigned, recorded, and issued, where the merits of the case cannot then be determined upon the record. The duty is not merely ministerial, but involves judgment and discretion, which cannot be controlled by this writ."

U. S. *vs.* Edmunds, 5 Wall., 563.

Nothing can be clearer than that the duty of the surveyor general to issue the indemnity certificates of location to Drew, in payment and satisfaction of the land grant made to Francisco Adante, his author, arose only on proof satisfactory to him that the claim had been confirmed and remained unsatisfied, and that the applicant for relief was the lawful owner of it. Had we applied to that officer for relief before the suit was filed, and he had refused to consider the case and make an adjudication, *that* duty would have been an appropriate one for enforcement by mandamus:

"If the plaintiff's contention is well founded that the duty of the Commissioner of the General Land Office *to take up, hear, and determine his appeal* exists, that duty, so far as relates to entering upon its performance, is strictly ministerial, and his remedy is at law by mandamus and not in equity." (Craig *vs.* Leitensdorfer, 123 U. S., 778.)

Besides, the plaintiff in this case having his domicil in the western district of Louisiana, (Record 1,) the circuit court therein had jurisdiction under sections 2 and 5 of the act of 1887, and unless that act conferred jurisdiction on such court to entertain a mandamus suit against the surveyor general, residing at New Orleans, in the eastern district of that State, (Record 6), none existed at all. Surely such a suit, even in a proper case, could not have been maintained in that district under the act of March 3, 1881, (21 Stats., 507,) creating it and providing for circuit and district courts therein, unless the office of surveyor general were kept and his duties performed within its territorial limits.

This brings us to the enquiry whether the act of 1887, even in a proper case for a mandamus suit against an executive officer of the United States, makes it necessary in the multitude of cases against the Government in which it was foreseen that the final judgments against the United States must devolve for their execution upon one or more of such officers, that they should be joined as parties defendant in the first instance. Nothing in the law points that way, but all the other way. Before its passage there was no imaginable case in which a mandamus suit could, under settled principles, be maintained against such an officer

in which there was wanting competent tribunals to sue in and settled rules of practice and procedure. Such suits were never deemed suits against the United States, and hence the new law did not provide for them or contemplate them. Its provisions as to the procedure in the circuit and district courts, the service of petition upon the Attorney General, and then on the proper district attorney, that the latter should report to the former the record and testimony in suits decided in such courts against the Government, in order that he might decide whether an appeal should be taken or not, show beyond controversy that the law looked to but one defendant—the United States—and to the ordinary legal counsel and attorneys of that defendant, the Attorney General and the proper district attorneys, as necessary parties—necessary defenders and advisers.

If the judgment in this case becomes final it will be because the law of the land, as thus expressed by its highest authority, has seen fit to take the judicial powers vested in the surveyor general by section 3 of the act of June 2, 1858, (11 Stats., 294,) from that officer and vest them in the regular judicial tribunals; and this court will not anticipate the refusal of that officer to carry out such judgment. Should he refuse, *then* a mandamus would lie to compel obedience. There would be no judgment or discretion then left.

The act of June 2, 1858, section 3, (11 Stats., 294,) prescribed no time in which claims within its provisions should be filed or prosecuted to a termination before the proper executive department. The exercise of the duty thereby devolved upon the surveyor general necessarily involved an acquaintance with the laws of Louisiana and the decisions of its courts affecting the titles to property; the construction of deeds, wills, descents, executions; the laws of the United States affecting the confirmation of land claims; the question whether in the particular case the claim had been satisfied, and many other questions purely of a judicial nature. Of the last nine surveyors general in that State but one has been a lawyer. That officer is not required by law to be a lawyer. He has no law books, no legal counsel to advise him; no authority to summons witnesses or to compel their attendance, or to administer oaths. In short, he has none of the safeguards and appliances thrown around or given to the regular judicial courts of the Government to prevent fraud and imposition and secure able and uniform adjudications, just to the citizen and honorable to the great nation whose minister he is. These are some of the reasons, doubtless—and there are others—which induced Congress, in this class of claims, as in many other classes, to vest in the courts the settlement of these purely judicial matters and to take them out of hands and bureaux unfitted for their safe exercise.

We do not contend or admit that the act we sue under, so far as it transfers the duties and powers of the surveyor general under section 3 of the act of 1858 to the courts, trenches upon or absorbs executive duties. They are not purely or properly executive. Congress vested them in the surveyor general at the time from motives of expediency, and now revokes them and vests them in the courts, leaving to that officer the ministerial duty of preparing and issuing the indemnity certificates in pursuance of the final judgment and to the party or parties shown to be entitled to them. There is no good reason, and none has been urged, why this may not be done; why the whole matter should not be settled by a judgment obtained contradictorily with the government after full hearing and argument in open court. If the act of 1887 does not, in this class of claims at least, vest this jurisdiction in the courts and take it from the executive bureau, it might be difficult to find any other class which is so vested and so taken.

We respectfully pray for an affirmance of the judgment of the circuit court.

JAMES L. BRADFORD,
ALBERT H. LEONARD,
Attorneys for Petitioner.

Washington, D. C., January 28th, 1889.

POSTSCRIPT: It has been thought by members of the bar, whose opinions are entitled to respect, that the proviso on which this case seems to turn—"That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the *right accrued* for which the claim is made," must be understood to refer only to rights which had then accrued and which might have been sued on under general or special laws. In other words, that the intention, in harmony with justice and established principles underlying limitations and statutory bars, was to deny in such cases, by the new law, another right of action to claimants who had failed to avail themselves of such rights under former laws.

The following cases, coming up from the Court of Claims, support this view, and should the court entertain it, we beg leave to refer to them.

U. S. *vs.* Lippitt, 100 U. S., 667.
U. S. *vs.* Taylor, 104 U. S., 221.
U. S. *vs.* Cooper, 120 U. S., 126.
U. S. *vs.* Finn, 123 U. S., 231.

131-E
131-2a

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 178.

RICHARD T. KENNON, PLAINTIFF IN ERROR,

vs.

JOHN T. GILMER, ORANGE J. SALISBURY, AND MONROE SALISBURY.

FILED OCTOBER 23, 1885.

No. 203.

JOHN T. GILMER, ORANGE J. SALISBURY, AND MONROE SALISBURY, PLAINTIFFS IN ERROR,

vs.

RICHARD T. KENNON.

FILED NOVEMBER 12, 1885.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

broken horses for such purposes as aforesaid, and for such coach on which said plaintiff was a passenger as aforesaid, and being so conveyed from said Deer Lodge to Helena, and all of which was without any fault of pl'ff, and that he did not contribute in anywise to such carelessness and negligence of defendants therein, and that on said 30th day of June, 1879, and while plaintiff was such passenger and on defendants' said coach and on said road between said towns of Deer Lodge and Helena, said coach on which plaintiff was such passenger was by means of and by reason of the negligence and carelessness and mismanagement of said defendants and their servants, and by reason of a failure of defendants to provide suitable, safe, and gentle horses and a
5 suitable and competent driver for said coach on which plaintiff was being so conveyed, and by reason of said horses being unsafe and unsuitable, and that they became unmanageable and one of them jumping and throwing itself on the pole of said coach and thereby breaking the same, and said team of horses taking fright, said coach was, by said means and said manner, thrown into and placed into such a condition of peril as to endanger the life and safety of plaintiff and to make it apparently unsafe for plaintiff to longer remain in said coach, and to such an extent was it rendered so apparently unsafe for plaintiff to longer remain therein that he, being actuated by great fear of bodily injury by longer remaining on said coach, jumped therefrom to the ground; and that he so jumped from said coach by reason of the dangerous position in which it was placed by said defendants, and that it was placed
6 in such position and danger to plaintiff's safety by reason of and by the carelessness and negligence of defendants in not properly providing a suitable driver and safe and gentle horses aforesaid; and that in so jumping from said coach plaintiff was actuated by great fear of injury to himself and fear of danger of a loss of life in remaining in said coach longer, and in so doing he acted as a reasonable and prudent man would have acted under such circumstances, and did not contribute to the injury he received, hereafter named, thereby, and he was induced to and did jump from said coach by reason of said defendants by and through their carelessness and negligence in placing said coach in such position of peril to plaintiff's life and safety; and that in so doing he was not at fault in any manner but acted from great fear and for the purpose of avoiding and escaping what he as a reasonable and prudent man regarded or
7 would regard as greater danger by remaining in said coach; and that in so jumping from said coach to the ground one of plaintiff's legs *were* bruised, fractured, and broken, and insomuch that the plaintiff thereby then became sick, lame, and sore, and from which said break it became and was necessary to — and his said leg was amputated, and by reason thereof *he*, said plaintiff's, life was endangered, and he continued sick for three months then next ensuing, and was during all of said time hindered and delayed from attending to his business and carrying on the same and still is and will be during his lifetime disabled from attending to his business, and that his said business, to wit, that of merchandising

and carrying on the business of dealing in hardware, has suffered loss and deterioration by reason of plaintiff's inability to give
8 it his attention, and plaintiff has ever since said injury suffered and still is and will continue to suffer great bodily and mental pain by reason of said injury—all of which to plaintiff's damage in the sum of twenty-five thousand dollars; and by reason of being so disabled will be damaged in the additional sum of one thousand dollars a year for and during his lifetime; and by reason of said sickness and broken leg plaintiff was compelled to and did lay out and expend a large sum, to wit, seven hundred and fifty dollars, for medical attendance, surgery, medicine, and nursing, to pl'ff's damage in said additional sum of $750.00.

Wherefore plaintiff prays judgment for said sum of twenty-five thousand dollars and said sum of $750.00 and costs of suit.

THOS. L. NAPTON,
J. C. ROBINSON,
Att'y- for Pl'ff.

9 TERRITORY OF MONTANA, } ss:
Deer Lodge County, }

Richard T. Kennon, being duly sworn, says on oath that he is the plaintiff above named, and has heard read the foregoing complaint and knows its contents, and that the facts therein stated are true of his own knowledge.

RICHARD T. KENNON.

Subscribed and sworn to before me this 4th day of April, 1882.

J. C. ROBINSON,
Notary Public.

10 And on the 15th day of December, A. D. 1882, the defendants in said cause filed their amended answer to said second amended complaint; which said answer is in the words and figures following, to wit:

Title of Cause. Title of Court.

Now come the said defendants, and, by leave of the court first had, makes this their amended answer to the second amended complaint of plaintiff herein:

1. Defendants deny that they undertook to carry plaintiff safely from the town of Deer Lodge to the town of Helena, as alleged in the complaint, otherwise or further than as common carriers of passengers and without any special contract the law required than to carry all passengers. Defendants deny that in managing or conducting or operating the coach from Deer Lodge to Helena, upon which plaintiff was a passenger, they were guilty of carelessness or negligence, or carelessly or negligently or unskilfully operated or conducted said coach, and deny that they failed to provide a
11 suitable, a safe, or competent driver, or failed to provide suitable or safe or gentle or well-broken horses for such purpose

or for such coach on which plaintiff was a passenger, and deny that on the 30th day of June, 1879, or at any other time, while plaintiff was a passenger and on defendants' coach and on the road between the town of Deer Lodge and Helena, or elsewhere, the coach on which plaintiff was a passenger was, by means of or by reason of the negligence or carelessness or mismanagement of defendants or their servants, or any of them, or by reason of any failure of defendants to provide suitable or safe or gentle horses or a suitable or competent driver for said coach, or by reason of said horses being unsafe or unsuitable, said coach was thrown into or placed in such a condition as to endanger the life or safety of plaintiff or to render it apparently unsafe for plaintiff to longer remain in said coach; and defendants deny that it was apparently unsafe for plaintiff to remain
12 longer in said coach; and deny that he jumped from said coach by reason of any dangerous position in which it was placed by defendants; and deny that said coach was placed in any position or danger to plaintiff's safety by reason of by the carelessness or negligence of defendants in not properly providing a suitable driver or safe or gentle horses, or otherwise; and deny that plaintiff, in jumping from said coach, acted as a reasonable or prudent man would have acted under such circumstances; and deny that plaintiff did not contribute to the injury he received, as stated in the complaint, thereby; and deny that he jumped from said coach or was induced to jump therefrom by reason of said defendants by or through their carelessness or negligence in placing said coach in any position of peril to plaintiff's life or safety; and deny that in so jumping plaintiff was not in fault in any manner; and deny that he acted for the purpose of avoiding or escaping
13 what he, as a reasonable and prudent man, regarded or would regard as greater danger by remaining in said coach.

Defendants deny that plaintiff is now or will be during his lifetime disabled from attending to his business; and deny that his business has suffered loss or deterioration by reason of plaintiff's inability to give it his attention, or that he will continue to suffer great bodily or mental pain by reason of the injury to him stated in the complaint; and defendants deny that by reason of any act of defendants plaintiff has been damaged in the sum of twenty-five thousand dollars or any other sum, or will be damaged in the additional sum of one thousand dollars or any other sum a year for or during his lifetime or for or during any other time, or has been damaged in the sum of seven hundred and fifty dollars or any other sum for expenses incurred or money paid out for medical attendance, surgery, medicine, or nursing or for anything else; and
14 defendants *and* deny that plaintiff by any act of defendants has sustained any damage or been compelled to lay out or ex-end any money.

And defendants, further answering, aver that plaintiff was guilty of contributory negligence in jumping from the coach at the time of the accident stated in the complaint; that his jumping from said coach was negligent and unnecessary on his part; that said jumping was the direct and immediate cause of the injury sustained by

him and without which he would have suffered no injury; that thereby he negligently caused said injury to himself or contributed thereto directly, and is therefore estopped from recovering herein.

Defendants, having fully answered, ask judgment that this action be dismissed and for their costs.

S. DE WOLFE,
A. E. MAYHEW, AND
W. W. DIXON,
Att'ys for Def'ts.

15 TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

H. S. Howell, being duly sworn, says that he is the agent in the said Territory of Montana of the defendants in the above-entitled action; that affiant makes this verification for the reason that all of said defendants are now absent from and reside out of said Territory of Montana, and are therefore at this time unable to make this verification, and that affiant has read the foregoing amended answer, and that the facts therein stated are true to his best knowledge, information, and belief.

H. S. HOWELL.

Subscribed and sworn to before me this 15th day of December, A D. 1882.

GEO. W. IRVIN, II, *Clerk*,
By R. L. DAVIS, *Deputy Clerk.*

16 And after the trial of said action and verdict of jury therein, to wit, on the eighteenth day of December, A. D. 1882, the defendants in said action filed their notice of motion for new trial in the words and figures following, to wit:

Title of Cause. Title of Court.

To the above-named plaintiff:

Take notice that the defendants in above cause will move the court to vacate and set aside the verdict of the jury rendered in said cause and to grant a new trial therein on the following grounds, to wit:

1st. Excessive damages, appearing to have been given under the influence of passion or prejudice.

17 2. Insufficiency of the evidence to justify the verdict of the jury, and the same is against law.

3. Error in law occurring at the trial and excepted to by the defendants.

That the court erred in admitting in evidence the depositions of Catharine and Millie C. Goodell.

Second. The court erred in admitting in evidence the deposition of George Piatt and the several interrogatories and answers therein against the objection of defendants.

Third. In giving the fourth, fifth, sixth, seventh, eighth, ninth, and tenth instructions, which the court gave at the instance and re-

quest of plaintiff, and which were duly excepted to before said cause was submitted to the jury.

Fourth. The court erred in overruling defendants' motion for a change of venue in said cause.

The motion for new trial will be made upon a statement hereafter to be prepared

18

S. DE WOLFE,
W. W. DIXON, AND
A. E. MAYHEW.

And upon said notice appears the following acknowledgement of service thereof, to wit:

We do hereby acknowledge service of the foregoing notice of motion for new trial, by copy, at Deer Lodge, M. T., this 18th day of December, A. D. 1882.

THOS. L. NAPTON AND
ROBINSON & STAPLETON,
Att'ys for Pl'ff.

And on the same day there was filed herein a stipulation in writing between plaintiffs and defendants, which is as follows, to wit:

19

Stipulation.

Title of Court. Title of Cause.

In this action it is hereby stipulated and agreed by and between the parties, by their counsel, that the hearing of defendants' motion to set aside and vacate the verdict and to grant a new trial herein (notice of which motion has been this day given) be set for the first day of the next regular term of said court; that defendants have forty days from this date to prepare and serve a draft of statement on said motion for new taial; that plaintiff have forty days after service of said draft of statement to prepare and serve amendments thereto, if he desires, and that defendants have until the first day of the next regular term of said court to present the state-

19½ ment or statement and amendments to the court or judge for settlement, and to have the same settled or certified or agreed to.

It is further stipulated and agreed that defendants, upon complying with such terms as the court may impose, have a stay of all proceedings herein until said motion of defendants for said new trial shall be heard and disposed of.

It is also agreed that the term- of this stipulation be entered of record as made by order of court with consent of parties.

Dated this 18th day of December, A. D. 1882, and signed—

THOS. L. NAPTON &
ROBINSON & STAPLETON,
Att'ys for Pl'ff.

S. DE WOLFE,
A. E. MAYHEW, &
W. W. DIXON,
Att'ys for Def'ts.

And afterwards, to wit, on the seventh day of May, A. D. 1883, the defendants filed herein their statement on motion for new trial, which is as follows, to wit:

20 *Statement.*

Title of Court. Title of Cause.

This is an action for damages for personal injuries sustained by plaintiff while a passenger on defendants' coach, between the towns of Deer Lodge and Helena, Montana Territory, on the 30th day of June, A. D. 1879.

The cause, being regularly called, was tried by a jury. The trial began on the 15th and ended on the 18th day of December, A. D. 1882.

Before a jury had been called in said cause the defendants, by their counsel, moved for a change of venue, on the ground that an impartial trial could not be had in the county of Deer Lodge, and in support of said motion filed in said cause and read to the court the affidavit of Solomon Riddle, which was as follows:

21 TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

In the Second District Court, Deer Lodge County, Montana Territory.

RICHARD T. KENNON, Plaintiff,
vs.
JOHN T. GILMER *et al.*, Def'ts.

S. Riddle, being duly sworn, deposes and says that he is agent of defendants in the above-entitled cause; that he resides in the county of Deer Lodge, where said action is depending; that he is acquainted with and knows the general sentiments and opinions of the public in reference to said action and the parties thereto, and from his knowledge of such public opinion affiant has reason to believe and does believe that the defendants cannot have a fair and
22 impartial trial of said cause in the county of Deer Lodge; that the general sentiment of the public in said county is prejudicial to defendants, as far as concerns said action; that one trial has already been had of said cause in this county, in which heavy damages were awarded to plaintiff by the jury which tried said cause; that said verdict and the judgment rendered thereon have been generally canvassed and commented upon by the public in a manner favorable to the plaintiff and unfavorable to defendants, and thereby has produced a general prejudice against defendants which cannot fail to have an influence on the second trial of said cause.

S. RIDDLE.

Subscribed and sworn to before me this 17th day of April, A. D. 1882.

GEO. W. IRWIN, II, *Clerk*,
By R. L. DAVIS, *Deputy Clerk*.

23 The plaintiff, in opposition to the motion for a change of venue, filed and read in said cause the affidavit of Richard T. Kennon as follows:

TERRITORY OF MONTANA, } ss:
Deer Lodge County, }

In District Court, 2 Judicial District, Deer Lodge County, Montana Territory.

RICHARD T. KENNON *vs.* JOHN T. GILMER *et als.*

Richard T. Kennon, being duly sworn, says on oath that he is the plaintiff above named, and that he is and has been for many years last past, and now is, well acquainted with the people of said county; that said defendants are all non-residents of said county and Territory and none of them have ever resided in said county, and that said Monroe Salsbury and John T. Gilmer have not been in said county or Territory for twelve or more years, to affiant's knowledge, and said Orange J. Salsbury has been in said county or Territory but a few times for twelve or more years, and that defendants
24 have been conducting their business in said county and Territory entirely through their agents, and the people of said county have seen so little of defendants they have had no opportunity to become prejudiced against them, and they are known to but few people in said county or Territory; that about the same state of *footing* towards them exists in this as in other counties of this Territory, and they are as favorably known here as elsewhere in this Territory, and no prejudice exists against them here in this county.

RICHARD T. KENNON.

Subscribed and sworn to before me this 15th day of December, 1882.

J. C. ROBINSON,
Notary Public.

The court withheld its judgment on said motion for change of venue until a jury had been called and examined on their "*voir dire*," and then overruled said motion; to which ruling of the court the counsel for defendants excepted and afterwards submitted its bill of exceptions thereto, which was allowed and signed by
25 the judge of the court.

After a jury had been empanneled to try said cause the following evidence was offered therein on the part of the plaintiff.

(Title of Court and Cause.)

After the jury in the above cause had been empanneled the de-

fendants' motion for change of venue was overruled; to which ruling of the court defendants, by their counsel, except.

RICHARD T. KENNON, called and sworn for plaintiff, *and* testified as follows:

Examined by Mr. ROBINSON:

State to the jury if you are the plaintiff in this case.

I am.

State what occurred on the 29th or 30th—the 30th day of June, I believe it was—in regard to your going to Helena, and what
26 you did.

In going to Helena on the stage coach?

State what you did with reference to going to Helena.

I paid my fare and got on the coach to go to Helena, and the horses ran off.

Who else were passengers on the coach?

Dr. Mitchell, Mr. Forbis, Mr. Hyde, Mr. McCormick, Dr. Ives, Mr. Marian, Mr. Speer, and another gentleman—a stranger—and myself.

Well, state what occured, if anything unusual did occur, and where it occurred.

The stage horses ran off—they got freightened. It was about, I think, between 5 and 6 miles this side of Helena.

State from the beginning, the time just preceeding the time the horses ran off, and everything you know.

Well, nothing occurred preceeding that time that I know of. We were riding along smoothly and nothing unusual occurred until the horses took fright, and the alarm was given, and the unusual
27 noise frightened all of us in the coach. We couldn't see what was going on, but we supposed, of course, the tongue was broken, by the great noise and rattling that was made, and the motion of the coach—the swinging motion.

What kind of motion was it?

Well, it was a zig-zag motion.

Anything unusual from the motion a coach will make running along smoothly?

Yes, sir; the horses didn't seem to have any power to guide it. I supposed the tongue was broken.

What did the passengers do?

They all jumped out of the coach as fast as they could and halloaed; I didn't understand what they said.

Were they excited?

Very much so. I saw one man light on his head and shoulders in the rose bushes.

What did you do?

28 I jumped out; I got out as quick as I could, but some, being a little spryer than I was, got out first. I balanced myself on the brake as well as I could and jumped and cleared the wheel.

What were the team doing?

It was running at full headway as fast as it could—running very rapidly, I thought.

State if the others jumped ahead of you.

I was the last one to get out.

The coach was under full headway?

Yes, sir; at the time I jumped.

State the condition of the road—the character of it.

There is two roads running parellel, one above the other. The lower road is the old road, and this upper road was cut in the bank to allow teams to pass.

About how far apart do the two roads run?

29 I don't know. It isn't more than ten or fifteen or twenty feet apart at the furtherest.

How far was it from the point of diversion of the two roads until they came together again?

I don't think it could be over two hundred yards from where they separated to where they came together again. That is a mere guess; I didn't measure it.

Which road was the coach on—the one on the flat ground or the dug one?

The upper one.

How high an embankment was it?

To the lower road?

Yes.

I think it would be the height of that table. The wagon run right on the edge of it. My great fear was that it would turn over that embankment.

About as high as that table?

I think so.

And where the road was graded in the hill about how high

30 was it from the upper side to the lower?

It was very nearly level. It was graded some.

State if there was any stoppage of the coach after the first fright and jump of the horses.

There was a slight stoppage after the first break; I don't think it could have been over a second or two. I don't think the passengers all got out before they started, but when I got out the horses had made a break and were running as fast as they could.

Do you know anything of the horses swinging around?

No, sir; I couldn't see them.

What caused all the passengers to jump out?

Fright, I presume; it caused me to jump.

About how far did the team run, as far as you could tell, after you got out?

Oh, a short distance. I don't think it could have been over sixty or eighty yards to where the team stopped.

31 State what effect your jumping out had on you.

I fell when I jumped out, and the first thing I discovered when I turned up was my ankle joint dislocated and the bone of my leg sticking through my pants.

Sticking through your pants?

Yes, sir.

What did they do with you?

They pulled the leg *in* joint in its place as well as they could and tied it up with some rags.

Did it stick in the ground?

The ground was too hard. It struck the ground, and Dr. Mitchell wiped the dirt off.

What did they do then?

They bandaged it up as well as they could.

Well, what then?

They put me in a private wagon and hauled me to Helena.

32 Where were you taken.

I was taken to the old St. Louis Hotel.

In Helena?

Yes, sir.

How long did you remain there?

I remained there some ten weeks or two months.

Under medical attendance?

Yes, sir.

Who attended you?

Dr. Mitchell, and Dr. Stell in Dr. Mitchell's absence, and Dr. Morris.

You stayed there about ten weeks?

I think it was about that time. It was over two months.

You were under surgical treatment all that time?

Yes, sir.

I don't think it is necessary to state that your foot was amputated. Was the amputation from that wound?

Yes, sir.

33 State if your medical treatment ceased after you were brought home.

No, sir; I was under Dr. Mitchell's care for some time afterwards. I didn't require much medicine, but he called to see me frequently.

How long was it before the leg healed up?

I didn't take particular notice of that. It was over a year. It would heal up and then a bone would come out. The treatment was ordinary treatment by a physician—bandaging and putting ordinary material upon it. Small pieces of bones came out 3 or 4 different times—small bones.

Have you been able to walk without crutches?

At times. I have an artificial — and foot, and I have worn it 3 or 4 different times all day, but usually I can't wear it for

34 more than two or three hours without much pain. The leg is very weak, although healed up, and I have to pull the leg off to rest it.

About how much did you pay for medical attendance, nursing, &c.?

My bill up to the time I got home footed up about $750.00—nearly $800.

What was that for?

Treatment of the leg.

I will ask you what kind of horses were they working in the coach that day?

There was a light-colored horse and the balance, I think, were dark. I never take notice of horses unless there is something peculiar about them. It was a fine team. I noticed they were good horses.

I will ask you to state while you were at the St. Louis Hotel what was the character of the weather.

It was summer time—warm weather.

35 About how warm was it?

The sun—for several days it was very warm—excessively warm. I don't know the degrees. I know it was very warm.

State the extent of pain it produced.

I couldn't do that, Mr. Robinson. I suffered a great deal at times and at other times rested easy. The doctor would remove the bandages and sticking plaster and then it was very painful. After it was dressed and I got over the nervousness I rested easy until he dressed it again, but at times it was very painful—shooting pains and cutting.

I will ask you how long that leg continued to pain you—whether you do now feel any pain?

Occasionally I do feel pain. Now, a few nights ago I had some very accute shooting pains, like the prick of a sharp instru-

36 ment. That occurs often since my leg was cut off.

State about how frequently.

Well, as much, I suppose, as a dozen times or more. They don't occur often. Some — imagine there is a sharp bone trying to come out.

State whether or not you have had any accident occur by slipping or falling.

Yes; I have, several times; but no serious accident. I have slipped several times and bruised the leg and broke the skin and caused it to bleed, but it only lasted a short time. I stepped through a hole in the floor at a festival—a knot hole—some time ago. My crutch went through the floor and, of course, I always fall on that leg, but the hurting don't last but a short time.

State how long after you moved to Deer Lodge the pain ceased so you could go on crutches.

37 I don't know how long. It was several weeks before I could go on crutches. I don't know the time. I went on crutches some time before my leg healed up.

How long was it before you came out of you- room?

I didn't take notice of that. I lay in my house a good long time after I came from Helena. It was two or three months.

State what effect—state what effect it has on you in attending to your business.

There is very little business I can attend to now. It deprives me almost entirely of attending to any business.

State if your business would be more remunerative and profitable if you could attend to it.

Yes; I think it would.

State if it necessitates the employing of other help.
38 Sometimes it does. We don't employ men regularly.
What business are you engaged in?
The hardware business.
State about what it costs you to live, Mr. Kennon.

Mr. DIXON: What was that question?
Mr. ROBINSON: What is costs him to live.
Mr. DIXON: I object to that; it appears to be irrelevant.
Mr. ROBINSON: It is a question for the jury to take into consideration in assessing damages.
Mr. DIXON: We object to it as not relevant to the matter in issue here.
The COURT: Objection sustained.

Mr. ROBINSON: State whether or not the amputation of your leg was caused by this incident.
Yes, sir.
And your leg was broken by your getting out of the coach?
Yes, sir.
From the condition of your leg at this time could you state
39 to the jury any probability as to your leg continuing in such a condition as to compel you to use crutches?
No, sir; I can't say that, certainly. I am still trying to strengthen and harden it, so I can use a leg.
Are you using remedies?
Yes, sir.
At the present time?
Yes; I am at the present time using a remedy outside of my physician's knowledge.
Have the physicians been prescribing for you all the time for that?
Yes, sir.
Are you still under medical treatment?
Well, I hardly think so. I use a remedy prescribed by Dr. Woolfolk, called goose oil. I would hardly call that medical treatment.

Cross-examined by Mr. DE WOLFE:

Mr. Kennon, can you state what length of time elapsed between
40 the last passenger getting out of the coach before you jumped yourself?
No, sir; I can't; but it was certainly a very short time. I followed the last one as quick as possible.
Do you know who got out last, before you?
I don't know, but it occurs to me it was Mr. Forbis. I am not sure, though.
Do you remember anything being said to you by the driver or any of the passengers just before you got out of the coach—not to jump?
No, sir.
Was anything said to you to jump?

Not that I heard. I was told by Dr. Mitchell that he told me to jump, but I couldn't distinguish it.

What impelled you to jump?

My fear of the coach upsetting and falling from that bank; that was the first thing that occurred to my mind.

41 Didn't you state at a former trial of this case—did you use an expression of this kind—that you didn't want to be the only black sheep in the coach? Do you remember that?

No, sir.

Did you say anything to that effect—that you didn't want to be in the coach when all the rest of the passengers were coming out?

No, sir; I don't think I did. My simple idea was to get out. I don't remember of saying that.

Do you remember stating in answer to the question on your direct examination at the former trial that you were going with the boys and did as the boys had done?

No, sir; I don't remember that.

Do you remember whether the coach was in motion when the other passengers jumped from it; whether the horses were in the act of running at the time?

42 I don't remember whether they commenced to jump or not. I don't think they did. I think there was a sudden hault, and they all jumped out. I don't think it was more than two or three seconds, and they were all out.

And then the horses started, and you jumped?

Yes, sir.

In what part of the coach were you sitting?

I was sitting on the front seat.

How many seats were there in the coach?

There were three.

What number of passengers were on a seat?

There were three on the seat I was on—Mr. Hyde, Dr. Mitchell, and myself.

What part of the seat did you occupy?

I think the middle part. Mr. Hyde got out on one side, and Dr. Mitchell on the other.

43 On which side did Dr. Mitchell get out?

I think on the upper side.

And Mr. Hyde?

I think on the lower side.

You had no opportunity to get out until they cleared the way for you?

Yes, sir; that is my recollection.

You think the other passengers got out before the horses started?

It was about that time the horses commenced to jump.

I understood you to say, Mr. Kennon, that the distance between the roads at the point where the accident occurred couldn't have been more than 10 or 15 feet apart.

I don't think it was that far.

You spoke of one road being 3 feet higher than the other.

44 About that, was it a gradual grade or was it a sudden pitch?

It wasn't a perpendicular pitch, but it was a steep bank. There was no grade there. As it run down to the other road it was pretty steep.

Was there anything to prevent the passage of a person or animal between these two roads?

I don't think animals could pass without squeezing themselves; but no vehicle could pass.

The grade was too great?

Yes, sir.

You didn't see this pack animal?

No, sir; I couldn't see it. I saw a heavy team passing—an ox-team.

Was this before the accident or afterwards?

I think before.

Which one of the roads was the ox-team on?

On the lower road.

Going in an opposite direction from the coach?

Yes, sir.

Was it loaded?

I don't remember.

45 What was your age at the time the accident occurred?

I was about 54.

What was your general condition of health before that time, as to robustness?

Well, I hav-n't been a robust man for a good many years. My general health was good and it has been pretty good since, but a strong man I have not been.

You were not prior to the accident?

Not a robust man, but my general health was good. I hav-n't been a strong man for many years.

Is your general health as good now as before the accident?

I believe it is.

That's all.

Mr. ROBINSON: We will read the testimony of Mr. Marion.

Testimony of Jos. E. MARION, introduced as appears in statement on appeal, and read to jury as follows:

46 I reside in Missoula county. I traveled on the coach between Deer Lodge and Helena about June 30th, 1879, in company with R. T. Kennon. On the last day of June, 1879, I was going to Helena in company with Mr. Kennon, Mr. McCormick, Mr. Hyde, Mr. Ives, Dr. Mitchell, Mr. Forbis, and two other gentlemen of whom I don't know the names. I remember Mr. Spear was on the top of the coach. Inside were Mr. Kennon, Dr. Mitchell, Mr. McCormick, Mr. Hyde, Mr. Ives, & Mr. Forbis—six of them. Outside were Mr. Spear and a stranger, the driver, and myself. I saw Mr. Spear, but did not know his name; was not acquainted with him. I was sitting with the driver, to his left, and Mr. Spear and the stranger were sitting behind us on the roof of the coach. I was a member of the Legislature and going over to attend the extra session from Missoula

county. We were going along in a small trot, and I saw a man coming towards us on horseback and driving a pack horse
47 ahead of him. I would not be positive as to the color of the riding and pack horses, but believe they were dark horses. When I first saw them I judge they must have been about 300 yards ahead of us. In the meantime the driver remarked to me, I wonder if the damn fool will turn that horse out of the road. About that time the leaders got scared, went along a little further, and finally stopped, and the nearer the pack horse got to the leaders the more they got scared, and the leaders wheeled around to the left, and the driver asked me to get down and catch them if I could, which I did. I jumped down in order to catch the leaders, but they were too fast for me; they wheeled right around to the right and in doing so broke the tongue. I helped fix the tongue, and judge it was broken about half way ahead of the double trees. After the horses had broken the pole they undertook to run away. They were running pretty fast, and the passengers inside jumped out of the coach. Mr. Kennon was the last one to jump, and in jump-
48 ing broke his leg. When I saw Mr. Kennon sitting alongside of the road I went to him, and, after helping the other gentlemen to partly fix his leg, —. When I went to him he was sitting on the ground with the leg broken, the bone sticking out and partly covered with dirt. After assisting Mr. Kennon I went to help the driver. He had stopped the team 50 or 75 yards from where the accident happened. I helped unhitch the horses. I led the leaders down to some trees at the side of the road. The driver had the wheelers.

"Q. What did the driver tell you about the leaders?"

(Objected to; objection sustained; plaintiff excepts.)

This was 2 or 3 minutes, I should judge, after the accident that I took the leaders away. I got there about two minutes after the horses stopped. The driver was trying to quiet the team and unhitch them. The nigh horse, I believe, was a bay and
49 the off leader was a buckskin or dun. The nigh wheeler was a bay. When I took them to hitch them—the horses—they were scared and wanted to go, and I held on to them. At the time I jumped from the coach only the remark that the driver made was, "I wonder if that damn fool will turn this horse out of the road," and immediately after that the horses turned to the left and I jumped down to catch them. I don't recollect any other conversation between myself and the driver at that time—before the accident. The driver did not say anything else that I recollect at that time, before the accident or before or at the time the passengers jumped out. The pack animal had a bulky pack on him.

Cross-examined on behalf of defendants, the witness testified:

I remained with Mr. Kennon after he jumped from the coach. It might be less or more than two minutes. The passengers, Mr. Mitchell, Hyde, Ives, and others, were with him. After I left
50 Mr. Kennon I went to the team immediately. We got to Helena between 4 & 5 o'clock p. m., I believe. I went on the

coach. I rode with the driver. On reaching Helena I don't remember to have met Mr. Mills nor stated to him that the accident was not one for which the company was responsible. I had several conversations with him while in Helena. I think I can state the conversation I had with Mr. Riddle. I met him on Nine-Mile Creek, in Missoula county, in the last of August or first of September. I don't think I could state exactly what I said to Mr. Riddle. I didn't state to Riddle that the company was free from all blame. Some time in the latter part of August or beginning of September—I don't recollect exactly which—I was on my way down from Nine-Mile Creek to Missoula and met Mr. Riddle going up to see me. When I met Mr. Riddle I did not know who he was nor he did not know who I was. We stopped and talked a little while to-
51 gether, and he finally asked me if my name was Marion and I told him it was. Then he says to me that I was the man he was looking for. I offered to turn back to my place with him, but he said that he would turn back and we could talk as we went on. After riding a short distance he asked me if I was on the coach going to Helena when Mr. Kennon got his leg broke. I told him I was a passenger on the coach at the time. Mr. Riddle says to me after that that Mr. Kennon had sued the company for twenty-five thousand dollars damages and seven hundred for medical attendance, &c. Then Mr. Riddle says to me if I was on the coach I certainly knew how the accident happened. I told him that I knew all about it or thought I did; that at the time I was riding on the outside with the driver. He asked me how it happened and I told him that the pack horse had scared the horses, broke the pole, were trying to run away, and the passengers inside jumped out,
52 and Mr. Kennon broke his leg in jumping out. Mr. Riddle asked me if I thought it was the driver's fault. I told him that I did not think it was. He then told me that they would have to have me as a witness. My answer was that I had no desire to appear as a witness in the case; that it was a long ways from home, and I would not come if I could help it. Mr. Riddle told me that I was the only witness that they had and they were bound to have me come. After we got to Missoula, to make it interesting for me to come, I believe, Mr. Riddle gave me a free pass in the coach, good all over his division until the first of January, and, I believe, that ended it. I stated to Mr. Riddle in this conversation, in substance if not in exact words, that I hated to appear and testify against Mr. Kennon. I rode all the way from Deer Lodge to the place of the accident with the driver. I was not acquainted with the driver. I noticed his condition on that day as to sobriety. He was sober.

53 Re-examined on behalf of plaintiff, the witness testified:

There was some whiskey along in the coach. I don't know if Mr. Spear had any. I had no flask of whiskey; did not notice whether the driver had any drinks. I had half a dozen drinks, perhaps; maybe more. I don't know whether the driver drank any or not.

Recross-examined on behalf of defendant, the witness testified:

The pack animal was right up to the leaders' heads when they swung round to the left. I did not see the pack animal afterwards or know where he went.

Counsel for plaintiff then offered to read in evidence the depositions of Millie C. Goodell and Catherine Goodell.

Defendant's counsel objected to the reading — said depositions on the grounds that the same were immaterial and irrelevent.

54 The court overruled the objections and admitted said depositions to be read in evidence, as follows:

Defendants except.

(Title of Court and Cause.)

Depositions Offered by Plaintiff.

"Second Judicial Dist. Court, County of Deer Lodge, Territory of Montana.

"R. T. KENNON *v.* JOHN T. GILMER, *et al*

"Depositions of Mrs. Millie C. Goodell and Mrs. Catherine Goodell, taken before William H. De Witt, notary public, upon notice, at Helena, Montana, March 5, 1881, 10 o'clock a. m.

"Present: Chumasero & Chadwick, att'ys for pl'ff.; W. E. Cullen, att'y for def'ts.

"Mrs. MILLIE C. GOODELL, being first duly sworn, testified as follows:

55 "My name is Mrs. Millie C. Goodell; I reside at Goodell's Ranch, Ten Mile, Lewis and Clarke county, Montana. About July 1, 1879, I lived at the toll-gate—McDonald's toll-gate—the eleven-mile station. I know three of the horses used by Gilmer & Salisbury at that station when the accident occurred. One of the three was a buckskin, on the lead; another was a light bay, called Bitter Root; the other was one they called Preacher, a dark sorrel. The other I can't tell about; he was a new one. The bitter root horse was gentle in the team to handle and very ferocious when you got him started, and was bad about kicking. The Preacher was gay and high-lifed, and did not need much coaxing to start him. The buckskin would run at the drop of the hat; was bad about shying and quick to start. These horses were used about the first of July, 1879. On the day of the accident to the plaintiff this team was used by defendants, and the driver, John Mantle, was very drunk. He

56 came to the house to get some water to mix his drink, and when he came down the hill he was so drunk he could hardly sit on the box; he started out from the station in this way. In starting the buckskin was very wild and tricky, like a young colt. This 'Buck' is the same buckskin horse of which I formally spoke. He was changed around frequently and worked in different places.

He was at the station where I lived, on and off; some of the drivers would not drive him at all.

(Signed) "MILLIE C. GOODELL."

"Mrs. CATHERINE GOODELL, being duly sworn, testified as follows:

"My name is Mrs. Catherine Goodell; I live in Ten Mile, Lewis and Clarke county, Montana; I knew the buckskin horse used by Gilmer, Salisbury & Co. on the Deer Lodge road about July 1, 1879. I have seen him shy; saw him shy during fair week of that year. One afternoon the stage stopped at my house and the horse acted so that the driver could scarcely stop the coach. He
57 always shied when passing freight wagons near my house. He would shy so badly that the driver would have to run the team up to the fence and hold them there. The stage one day met some pack animals by my house and the buckskin horse acted so badly that the team nearly got away from the driver. I have seen this same buckskin horse act in this way very frequently. I have lived on the road for a long time, and have often seen this horse act as I have said.

Cross examination:

"Q. When did you first become acquainted with the buckskin horse you have mentioned?

"A. I could not say, as they drove him along the road for two years. It must have been two years ago and one year ago.

"Q. Did the defendants have more than one buckskin horse on the road, to your knowledge?

"A. I think they had two in that length of time; one that they drove single. They had another buckskin that they drove when they had only two horses on the coach. When the accident happened they had four.

58 "Q. Did you ever know anything of this buckskin horse you speak of except seeing him driven in this stage team?

"A. I do not.

"Q. You will state how often you have seen him shy in passing your house and give any particular occasion which you may recollect.

"A. It would be impossible for me to count it up, as he is always at it if he meets a team.

"Do you remember any particular occasion?

"A. When I was crossing the road one morning to my sister's I met the stage, and the horse got frightened at me so the driver could hardly hold him. The driver was so drunk he could hardly hold him.

"Q. When was this, as nearly as you can recollect? Which way was the coach going and who was driving?

59 "A. It was going towards Deer Lodge. It was John Mantle who was driving. He swore fearful oaths about the horse being such a skittish thing.

"Q. Did you ever ride after this buckskin horse you speak of or

have occasion to notice his behavior in the team except in passing your house?

"A. I never did.

"Q. Was this buckskin horse in the team on the 31st of June, 1879?

"A. If that was the date of the accident the horse was in the team.

(Signed) "MRS. C. M. GOODELL."

"Mrs. MILLIE C. GOODELL, being recalled for cross-examination, testified as follows:

"Q. Who was aboard the coach, if you recollect, the morning this accident occurred?

"A. It was late in the afternoon. I don't know; did not know any one except the driver.

60 "Q. Did John Mantle drink anything at your house on the day of the accident; and, if so, what was it?

"A. He drank on the porch, and it was liquor, I should judge, from the smell. He had the bottle with him.

"Q. Was that the first time you saw him that day?

"A. Yes, sir.

"Q. How long was he on the porch?

"A. Just long enough to take his drink and go right back to the coach again.

"Q. Where was the coach at this time?

"A. At the stage barn, across the creek.

"Q. Was the team hitched up and ready to start at this time?

"A. It had the wheelers on and not the leaders.

"Q. Where were you at this time and how far from the stage barn?

"A. I was standing in our front-room window. I can't tell the distance positively.

61 "Q. Were you standing there still when the coach started?

"A. Yes, sir.

"Q. Where were they working the buckskin horse you have mentioned?

"A. The near lead.

"Q. How far could you see the team and coach after they left the stage barn?

"A. About a half mile.

"Q. Did you see Mr. Mantle take more than one drink while he was at your house or in or around the station?

"A. No, sir.

"Q. Did you have any conversation with him on that occasion?

"A. Only when he asked for the cup."

In rebuttal:

"Q. What was his condition when he came in?

"A. He was drunk; had been drinking.

(Signed) "MILLIE C. GOODELL."

"TERRITORY OF MONTANA,
County of Lewis and Clarke, } ss:

62 "I, William H. De Witt, a notary public, duly commissioned, sworn, and qualified, dwelling in the city of Helena, Lewis and Clarke county, Montana Territory, do hereby certify that on March 5, 1881, at 10 o'clock a. m., personally appeared before me, at the office of Chumasero and Chadwick, on Main street, in Helena aforesaid, Mrs. Catharine Goodell and Mrs. Millie C. Goodell as witnesses in the case of R. T. Kennon *vs.* John T. Gilmer *et al.*, and W. F. Chadwick, Esq., attorney for plaintiff, and W. E. Cullen, Esq., attorney for defendants; and said witnesses, being by me first duly sworn, and being examined in chief and cross by the respective attorneys, testified as is written upon the annexed sheets numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 11. Their several depositions were by
63 meread over to the witnesses and by them severally signed.

"In witness whereof I have hereunto set my hand and affixed my official seal the 5th day of March, A. D. 1881.

[NOTARIAL SEAL.] (Signed) "WILLIAM H. DE WITT,
"*Notary Public, Montana.*"

Plaintiff then offered in evidence the deposition of George H. Piatt.

Objected to by defendant as immaterial and irrelevant.

Mr. ROBINSON: We offer it to show the disposition of the horse.

The COURT: If it has any tendency to show it the testimony should be received; if it has not, then it should not. I think this tends to throw some light upon the subject, and the objection will be overruled. The reporter will note an exception.

(Exception noted.)

Mr. DE WOLFE: The objection goes to the whole of the deposition.

64 The COURT: The reporter will note that the objection goes to the whole of the deposition on the grounds of irrelevancy, immateriality, and incompetency.

The deposition of George H. Piatt was then read in evidence as follows:

In District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

RICHARD T. KENNON *vs.* JOHN T. GILMER *et al.*

Be it remembered that pursuant to the stipulation hereunto annexed and on the 13th day of December, 1882, at my office, in the office of E. W. and J. K. Toole, on Main street, in the city of
65 Helena, Lewis and Clarke county, Montana Territory, before me, William Wallace, Jr., a notary public in and for the said county and Territory, duly appointed and commissioned to administer oaths, &c., personally appeared George H. Piatt, a witness produced on behalf of the plaintiff in the above-entitled action

now pending in said court, who, being first by me duly sworn, was then and there examined & interrogated by Masena Bullard, of counsel for said plaintiff, and Wilbur F. Saunders, of counsel for said defendant-, and did then and there testify as follows, to wit:

"Q. State your name, age, residence, and occupation.

"A. George H. Piatt; thirty-eight years; Helena; livery-stable keeper.

"Q. State whether you are acquainted with a horse by the name of and known as 'Buckskin,' and which during the year
66 1869 was owned and worked by Gilmer and Salsbury on their stage line between Helena and McDonald's toll-gate, on the Deer Lodge road.

"A. I presume I know the horse you have reference to."

Objected to as irrelevant (both question and answer) by counsel for defendants.

"Q. State whether you know a horse by the name of and known as 'Buckskin,' formerly owned by said Gilmer and Salsbury and worked by them between the points named in the preceeding question.

"A. Yes.

"Q. If you saw that horse in Deer Lodge, Montana, during the year 1881, state about what time and under what circumstances you saw him."

Objected to by counsel for defendants as irrelevant and incompetent.

67 "A. I saw the horse in Deer Lodge in March, 1881, at the time of the trial between Kennon — Gilmer *et al.* Myself and Mr. Davis were in the hotel. He asked me to ride with him. He brought around the horse and another one, hitched to a buggy. I got in the buggy. He drove out about a mile east of Deer Lodge. In turning in the lane towards the buckskin horse the pole crowded him and he kicked. When he came down he was straddle of the pole and sat down on it and broke it in two. He then tried to run and went probably seventy-five feet before Mr. Davis could stop him. I jumped out and held them by the heads until Mr. Davis got out and helped me to unhitch them. We then spliced
68 the pole, hitched them onto the buggy again, and drove back into town.

Objected to as incompetent, irrelevant, and immaterial.

"Q. Which horse did the kicking and caused the breakdown?

"A. The buckskin."

Question and answer objected to as incompetent.

Cross-examined:

"Q. State, if you remember, whether Davis did not strike the horse with the whip when they turned around in the lane just before the kicking."

Objected to by defendent's counsel as incompetent and immaterial.

"A. As I remember it, he did; I guess I could answer that—yes.

"Q. Do you know at that time whether the horse was being used or whether he had been standing in the stable for some time and was taken out for exercise?"

69 Objected to as immaterial by plaintiff's counsel.

"A. He was taken out for exercise. Mr. Biddle asked Mr. Davis to drive him out for exercise."

Answer objected to as being hearsay.

"Q. What would be the effect on a horse of keeping him up in a stable and not using him for some time?"

Objected to as being incompetent by plaintiff's counsel.

"A. It would have the effect of making him frisky and playful.

"Q. How long have you been engaged in your present business, and are you familiar with the habits and actions of horses?

"A. Nearly nine years. I am.

"Q. State, in your opinion, whether there was anything in the action of that horse on that occasion to indicate that he was not and could not be a good and safe horse to use upon a—— "

70 Objected to as incompetent.

"A. I would consider him a safe horse any place with a driver holding the lines. I did not consider that the horse did anything but what any high-lifed, mettlesome horse would have done under the circumstances.

"Q. Do you know that the horse at any time before or since ever made any similar exhibition?"

Objected to as immaterial.

"A. No, sir; I, of course, heard of the accident."

Redirect examination:

"Q. State whether or not the striking of the horse by Davis—if he, in fact, did strike him—was of such a violent character as would have caused a gentle, kindly-dispositioned, or well-broken horse to have kicked as you have testified the horse did upon the

71 occasion to which you refer.

"A. Sometimes a horse, if he is feeling very mettlesome, if he is struck very lightly, will kick and play. I did not consider that the horse kicked viciously, but when he struck the buggy it scared him, as I remember he struck the horse so that the whip cracked.

"Q. Is your statement that the horse had been standing in the stable and was taken out for exercise made from personal knowledge or from hearsay?

"A. It was made from hearsay. Mr. Riddle said that the horse needed exercise—at that time while I was in Deer Lodge.

"Q. State whether, in your opinion, from your knowledge of the

horse, he was an animal that would likely *to* run away upon
72 occasions similar to that which you have mentioned or upon the happening of any sudden or unexpected occurrence."

Objected to as not being re-examination and as being incompetent, irrelevant, and immaterial.

"A. Yes; I think any high-lifed horse will try to run away on getting straddle of the pole."

Answer objected to as incompetent and immaterial.

GEORGE H. PIATT.

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

I, William Wallace, a notary public in and for said Lewis & Clarke county, do hereby certify that the witness, George H. Piatt, in the foregoing deposition named was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said
73 cause; that said deposition was taken at the time and at the place mentioned in the annexed stipulation; that said deposition was reduced to writing by me, and when completed was by me carefully read to said witness, and, being by him corrected, was by him subscribed in my presence.

In witness whereof I have hereunto subscribed my name and affixed my seal of office the 13th day of December, A. D. 1882.

[SEAL.] WILLIAM WALLACE, JR.,
Notary Public, Montana.

Dr. A. H. MITCHELL, called and sworn for the plaintiff, *and* testified as follows:

Examination by Mr. ROBINSON:

I will ask you Dr. if you was one of the passengers on Gil-
74 mer and Salsbury's coach from here to Helena about the last day of June, 1879, when Mr. Kennon's leg was broken?

Yes, sir.

You were one of the passengers that day?

Yes. I was just thinking whether it was 1879 or not.

State to the jury what occurred on that day, and tell who was in the coach and who outside and what happened.

The coach had reached a point in the road about six miles from Helena.

Describe the road, Dr.

The coach was descending 10 Mile. It was in the canyon of 10 Mile, near a house there—I forget the man's name—where this occurred, but it was about six miles from Helena. The coach
75 suddenly stopped, and the first thing I observed—I was sitting on the front seat—the leaders swung around to the side of the stage. I looked out and it was just as though a team of horses were going to pass on the upper side of the stage. I heard some noise before. I heard some one say, The pole is broken; jump; and the horses swung around. There was in the stage at the time

Mr. Forbis, Mr. McCormick, Dr. Ives, Mr. Hyde, Mr. Kennon, and myself. Dr. Ives jumped out and I think I jumped next. I struck the ground and lost my balance and jumped up as soon as I could, and I saw the balance all jump out except Mr. Kennon, and I hollowed as loud as I could. The horses had swung up the hill and then they swung down the hill, and just as I raised to my feet I, as well as the others, hollowed to Mr. Kennon to jump out. Then the horses went right around behind some rocks and went out of
76 sight, and were caught by some man coming down, I think the man who lived there.

Why did you jump from the coach?

I jumped from the coach because I knew if the horses got away with the pole broken they would be apt to turn the coach over and hurt somebody. I think that was the cause of it. I don't know exactly what was the reason.

Describe the road there.

It is on a hill side and the coach was on the dug way. There were two roads; one was by the side of the fence on the level and the other was above it.

About how high was the upper road from the lower?

I think about a foot and a half or two feet; probably three feet. It was some little rise.

77 If the coach had run over there would it likely upset—the road the coach was on?

Yes, sir; I think there is a portion of the road that it would. There are some places much steeper than others. Where I jumped out I think it was much steeper than where Mr. Kennon jumped out.

Were there loose rock lying around on the road?

Yes; just ahead and in a line with the road; the road bore down towards the stream. There *there* is a high bank of rocks probably 6 or 8 or 10 feet high.

State how it was with reference to rocks of such a character that would upset the coach lying on either side of the road.

Till you come to this dyke that runs down the hill and
78 crosses the road there are no loose rocks. There were no rocks where I jumped out, but ahead and between the house there is a dyke of rocks that prevents you seeing the house.

Was it such that if horses running loose that way with the pole broken, would it upset the coach if it struck?

Yes; I think there was em-inent danger, the pole being broken.

You were riding inside?

Yes, sir; I think Joe Hyde, Mr. Kennon, and myself were sitting on the same seat.

I will ask you to state what the horses did after this time you spoke of, when they were swinging around.

Well, when they were swinging around I jumped out; the
79 coach was not going fast. The horses would jump and jerk us along and then stop, and during the pause I jumped out, and when I looked up the horses were just starting off and I hollowed to Mr. Kennon to jump out.

Did the horses continue to run?

They went out of sight, but they didn't have further to go than the length of this court-house to get out of sight. The horses were stopped within 50 yards of where we jumped out.

State whether they stopped before Mr. Kennon jumped out or afterwards.

After he jumped out, some 50 yards.

After he jumped out?

Yes, sir; the coach was in motion when he jumped out.

State what occurred on his jumping out.

80 Well, there was several of them nearer to him than I was. I saw him sitting on the embankment about two feet high, on the upper side of the dug way, holding his leg this way. They holloaed that Kennon's leg was broken and I went up and took his shoe off, and the large bone of the leg was broken and run through the skin. It shot out two or three inches, breaking the ankle joint, the small bone being broken and shattered and the large bone running through to the ground and all dirty.

State what your profession is.

I am a physician and surgeon.

State if you attended on Mr. Kennon.

I did, sir.

State where he was taken to and what you did.

81 Well, I washed the dirt off the end of the bone and dressed the fracture, put some splints around it, got a wagon from a man living within a few yards, and took him to town. I called in Drs. Morris, Steel, Brook, and Glück, and we held a consultation and decided an immediate amputation was necessary; whereupon I amputated it, within an hour and a half after the accident.

How long did you continue to treat him?

I continued in attendance upon him in Helena, Dr. Morris, Dr. Steel, and myself, from the last day of June, which, I think, was the day of the accident, until the later part of July. I forget now what day I left Helena, but he remained there a week or ten days and came over here and I was in attendance upon him some two months; maybe a little longer.

82 State as to Mr. Kennon's suffering.

He had a good deal of pain, it seems, from *from* the morbid condition of one of the nerves. It was very slow in healing. He had an attack of erycipilis, and from that time on he suffered more or less pain.

How was the weather?

The weather was very warm; it was during the warm weather.

State, if you know, how long it was before he was able to get out of his room—to get out on crutches.

I don't know how long it was before he could go on crutches.

You don't remember?

No, sir. I think the only thing I could fix in my memory was the remarkable thing which occurred during treatment—was the "*legative*" (ligature?—D.) I put around the *port kiderary* artery. I think it was one hundred and one days before I could get it

83 away. I couldn't pull it away. That was the only thing remarkable about the cure, but still the wound had healed except the *legative* artery.

During the course of your treatment was there any danger of death?

There was no time during treatment that death was em-inent. He had an easy inflam-ation that might have distressed him, but I don't think there was immediate danger.

Taking everything into consideration, was there a chance of producing death?

Well, a man of his age, in warm weather, where erycipilis ensues, it is considered dangerous; but I didn't think him in immediate danger. There is always danger where erycipilis attacks a wound.

How long did erycipilis continue?

I think for about seven days—6 or 7—something like that; that is my remembrance now.

84 Do you know anything of the condition of his leg at the present time—whether it has got entirely healed, or in such a condition that he could dispense with crutches?

No, sir; I haven't seen the leg—oh, I guess, for a year—small pieces of bone came away now and then for several months after the amputation. It would heal up and then become inflamed, an- I took several small pieces of bone out. The result of this erycipilis inflam-ation would retard it. Then there was a very tender nerve, and he has never been able to us- his artificial limb on account of it,

State if a man of his age, after amputation of the leg that way. what would likely be the effect as to shortening life—resisting such causes as usually produce death in mankind; whether or not

85 by reason of amputation if he would be in condition to resist death.

Mr. DeWolf: We object to that. It is immaterial and irrelevant. Mr. Kennon has testified himself that his health is good.

(Objection sustained.)

Mr. Robinson: I believe that is all.

Cross-examined by Mr. DeWolf:

Do you know the driver of the coach that day?

I didn't know his name, Colonel, but I have seen the man frequently.

Did you notice him that day, during any part of the trip from here to Helena, about his condition as to sobriety?

Mr. Robinson: We object; it is not cross-examination.

Mr. DeWolf: I will withdraw the question. State, Dr., how the coach was conducted from here to the point of accident.

86 I saw nothing unusual up to the point of accident.

At the time the accident occurred or previous to that time at what pace or rate of traveling was the coach driven?

At what speed were we going?

Yes; just before the coach stopped?

Well, I should think we were going at the rate of six or eight miles an hour; going down hill. I can't remember now whether we were going fast or slow.

Was there anything to call your attention to it?

No, sir; I think we were going along pretty fast.

Was it driven in an ordinary manner?

Yes; about as fast as we were going before.

When the accident occurred I understand there was a dike
87 down the hill that intercepted the view to the house?

Yes, sir.

It was six or eight feet high?

Yes; a sort of red quartz came up, and on the top of this ridge was this dike. I don't know whether it obscured the roof of the house or not.

I believe in jumping from the coach you fell?

Well, I lost my balance and came on my knees.

And then the coach disappeared beyond that dike?

Just as I raised and turned the horses seemed to dash off just as if they started suddenly, and Mr. Kennon was in the coach; I could see him. The coach described a sort of circle, so as to bring the off side in view, and I saw him and told him to jump, and in a moment the stage passed out of sight.

88 What intercepted your sight of the stage?

These rocks.

Did you see the stage when it stopped?

No, sir.

You stated something about somebody stopping the coach.

That is only what I heard.

Then I will ask that portion of the evidence to be stricken out.

The COURT: All testimony of this witness of what he heard from another person in relation to this will be stricken out and the jury will disregard it.

Mr. DEWOLF: You don't know anything about the coach stopping?

No, sir.

Did you see the coach at any time after that until you had attended to the wants of Mr. Kennon?

No, sir; just as I came up and saw the condition of the
89 leg I started to the house to get some water, and as I got to this bend of the dike there was a man coming with water, and I saw the stage standing by the house. The horses had been taken from the stage.

Did you see Mr. Kennon when he jumped?

Yes, sir.

Were the horses and stage both in the road at that time?

I think they were. Yes; I am pretty sure they were.

On which side of the road did he jump?

On the upper side. I think the stage was a little off of the road to the left; probably the right hind wheel of the stage was about in the centre of the road and the other wheel went down off the grade.

The whole dug way didn't amount to more than a foot and a half or two feet. There wasn't much of an incline.

Did you notice the shape of the ground at the point where
90 Mr. Kennon jumped, after you went to him?

Yes, sir.

How high was the upper part of the bank from the road-bed, where he lit?

I don't think more than two feet.

The distance, then, from the bed of the coach to the bank must have been very short?

It would have been very short if the coach had been in the road, but the upper wheel was some four or five feet away from the bank. There was two tracks, and the lower wheel was some four or five feet below. I think the tread of a wagon is some five or six feet; then it might be three or four feet. It occurs to me now that the wheel was as far as from here to that juror's foot. The embankment was off that far.

Did you observe the shape or lay of the ground beyond the two roads at that point?

91 Well, I don't know whether I did or not.

Can you state whether the incline was considerable?

Well, not a great deal. I should think the full of the lower road was probably four feet lower than the road bed of the graded road, but I am not prepared to state the distance between the two.

You think not over four feet, perpendicularly?

Not more than four or five feet.

Was the slope abrupt or gradual?

I think at this place it was gradual.

I understand that the upper wheel of the coach was in the centre of the road and the lower wheel projecting over?

Yes, sir.

But it didn't turn over?

No, sir.

92 I will ask you if you saw anything pass the coach at that point?

What?

Did you see anything pass the coach at that point?

No, sir. There might have been some animals passing, but I didn't see them. If I did—it occurs to me now that I did see them, but it was after I jumped out. I think the man who had the animals stopped after I jumped out and came up; I think the man came back to where Mr. Kennon was sitting. They had some loose horses, but I didn't see any horses pass.

Do you remember seeing a wagon pass at the time of the accident or just before—an ox team?

We were passing wagons continually. I don't remember now; it was two or three years ago; I don't remember whether there was any wagons passed or not.

93 You remember during the trip you passed a good many wagons, do you?

No, sir.

I understood you to say you passed them frequently.

Well, I don't remember any that day. There are a great many wood teams there, and I haven't been over the road that I haven't passed a good many, but I don't remember that day whether there were many or few.

You don't remember being over the road without passing a good many?

No, sir.

Did you observe at any part of that trip that the stage horses shied at any object?

No, sir; my remembrance is that we went along very pleasantly until we met with this accident.

That's all.

Redirect by Mr. ROBINSON:

I will ask you did Mr. Kennon pay you for your medical attendance on him?

94 Yes, sir.

Do you know how much he paid you?

No, sir.

I will ask you——

You asked me if he paid me. I don't know what amount of money has been paid. There has been a running account between Mr. Kennon and myself for years. He pays me money sometimes and sometimes I pay him. I don't know whether it is paid or not, but I imagine it is. There is a running account between us.

The stage company never paid you for it?

No, sir.

At the time the accident occur-ed, when you holloaed to Mr. Kennon, did you holloa loud enough for him to hear you?

I holloaed as loud as I could, but don't know whether he heard me or not. Mr. McCormick holloaed very loud and he heard him.

95 Did all the passengers jump off the coach?

Yes, sir.

State why they jumped off.

Well, Mr. Marian jumped off at the instance of the driver to catch the horses, and the others jumped off because they were frightened. I jumped off because I thought I was going to be upset. I thought I was safer on the ground than inside. There may have been a man by the name of McLaughlin who sat on the seat with driver. I don't remember now of seeing him on the ground until I saw him coming with a pan of water. He was the man who brought the water.

That's all.

Mr. ROBINSON: I will recall Mr. Kennon.

R. T. KENNON, recalled, examined by Mr. ROBINSON, *and* testified as follows for plaintiff:

96 I desire to ask you again in regard to your physical strength at the present time.

I have very little strength.

Mr. ROBINSON: How is it compared to what it was before you were hurt?

Well, I am not as strong as I was then. Of course, I am so situated that I can't take exercise.

So situated that you can't take exercise?

No, sir; only what little I get by going from the store to the house.

What causes it?

Inaction, I presume.

The result of the injury?

Yes, sir.

That's all.

No cross-examination.

Dr. A. H. MITCHELL, recalled for plaintiff, examined by Mr. ROBINSON:

97 I will renew the question I asked you, Dr., and they objected to, as to what effect such an amputation would be likely to have in weakening a man's strength and shortening a man's life?

Mr. DIXON: We object. We don't object to the first part of the question as to reducing strength, but as to shortening life we do.

Mr. ROBINSON: Well, I will withdraw the second part.

State what effect amputation of the leg would have as to weakening a man's physical strength, and effects as to health from want of exercise.

From inaction a man would not be so strong and would lessen the powers to that extent. A man's muscles become soft and flexible without exercise, but as to his health I don't know as it would have any effect.

Well, as to resisting diseases that usually attack men and produce death.

Mr. DE WOLFE: We object for the same reason.

Objection overruled.

98 Mr. DIXON: I will ask that the question be taken down.

Mr. ROBINSON: I will withdraw the question on the suggestion of Mr. Napton.

Depositions of George H. Piatt read to the jury and objections taken in depositions renewed as read, and exceptions taken to the ruling of the court.

At conclusion of reading depositions court adjourned until 9 o'clock to-morrow morning.

At 9 o'clock court called, and SOLOMAN SPEAR, called and sworn for the plaintiff, testified as follows:

Examined by Mr. ROBINSON:

Mr. Spear, where do you reside?

In Blackfoot.

Were you on one of the coaches of Gilmer and Salsbury about the 30th of June, 1879, when an accident occurred to Mr. Kennon?

Yes, sir; I was.

State what part of the coach you were on.

I was on the top of the coach.

99 Where were you sitting in reference to the driver?

There was another young man from Colorado sitting between me and the driver. I was back of the driver, sitting on the top of the coach.

State to the jury just where the accident occurred—what part of the road.

It must be about six or seven miles this side of Helena.

State to the jury the circumstances—what occurred.

Well, we were driving along; the upper road is graded to let teams pass. On the lower road was an ox team and we took the graded road.

About what distance do the two roads separate?

In the widest place.

I mean the distance from where they separate to where they come together again.

I should think about three hundred yards; maybe more and maybe less.

100 I will get you to take a pencil and draw a diagram of the roads.

Witness draws diagram.

Which road was the coach on?

On the graded road. Here the graded road runs out near where this house is. Here is where the horses stopped.

Whereabouts did they first start to run?

Well, they started about here.

About how far apart were these roads?

The distance between the two I don't think was more than seven or eight, maybe ten, feet.

How high would this upper road vertically be above this one?

I don't think in the highest place it would be more than 3 feet or 3 and a half; maybe four. When I got off the stage I rolled off more than jumped. I swung around and when I struck the bushes I was my full length. Between these two roads was

101 some rose bushes, and I fell on them. When I got up I was on the lower road.

If the coach would run off this road it would endanger it upsetting?

Oh, certainly.

Why did you get off the coach?

I was frightened.

State what was done.

When the horses got frightened they swung down and the driver

told Marian to catch the leaders. He jumped off, but they were too fast for him. They swung up the hill, and, in swinging back, they broke the tongue. I saw the danger and jumped off.

What did you get frightened at—the horses?

They got frightened at this pack animal coming along.

What did the animal have on?

A lot of traps that men use to camp out.

What else?

102 Well, it had on a buffalo robe, some cooking utensils, a bucket, &c. This young man from Colorado got off before I did, and the bushes caught him, too. He didn't get hurt nor I didn't get hurt.

State if all the passengers jumped from the coach.

Yes; they all jumped out.

State whether or not, taking the condition of the coach and all the surrounding circumstances, the way the horses were acting, that if a man, as a reasonable man, would jump from the coach to prevent injury.

Mr. DIXON: That we object to. It is calling from the witness an opinion that is for the jury. The witness can testify to the facts and the surrounding circumstances, and lay the matter before the jury.

Mr. ROBINSON: He stated it as a fact and not an opinion.

Mr. DE WOLF: We ask the court to strike out the answer of the witness.

103 Mr. ROBINSON: I don't care anything about it one way or the other.

Mr. MAYHEW: Then it ought to be stricken out.

Mr. ROBINSON: I have no objection to its being stricken out.

The COURT: The motion to strike out will be sustained.

Mr. ROBINSON: What was the character of the men who were in the coach?

Mr. DE WOLF: We object to that, because it is not involved.

Mr. ROBINSON: I will withdraw the question and ask another.

Do you know what office, if any, the passengers on the coach exercised, yourself and this man from Colorado excepted?

104 Mr. DE WOLF: We object to that, unless the witness knows of his own knowledge.

Mr. ROBINSON: I asked him if he knew.

Mr. DE WOLF: I meant to caution the witness.

Mr. ROBINSON: I want to ask the witness if they were all members of the Legislature.

Well, yes; they were all members of the Legislature.

Did the tongue of the coach break before Mr. Kennon got out?

(Not answered.)

State what effect the breaking of the tongue had on the coach as to the motion.

It had considerable motion. It came very near upsetting the coach before the tongue broke.

Did it throw the coach around?

Yes; it swung the coach around considerable after the tongue was broken.

Cross-examined by Mr. De Wolf:

How do you know some of those gentlemen on the coach
105 were members of the Legislature?

I thought they were going for that purpose.

Well, how do you know that? Do you know it of your own knowledge?

Yes, sir. That was my opinion.

How was your opinion derived?

From their conversation.

They told you so?

No; I don't know as I spoke to them about it.

Have you any personal knowledge of their being members of the Legislature?

That was my opinion.

How did you get that opinion? That is what I want to get at. Do you know anything about it more than you had been told?

Nothing more than what I heard.

Then I move to strike out the answer of the witness in regard to these men being members of the Legislature.

106 Motion sustained,

Mr. Robinson: Just simply as to their being members of the Legislature.

Mr. De Wolf: How long was it after the tongue broke that you jumped off?

After the horses swung back I saw the driver had nothing but the lines and I got off.

Did you get off simultaneously with their starting?

I got off just as they started.

Do you know whether most of the passengers had alighted before you got off?

Yes; most of them had.

You speak of a young man being on. Was he off before you?

Yes, sir.

And Marian?

He jumped off to catch the leaders.

And you jumped off as the horses started?

Yes, sir.

Did you fall?

107 Yes; I fell, but the bushes caught me.

And when you got up you were on the lower road?

Yes, sir; I had rolled over.

Now, it would take a few seconds in time from the time you rolled off until you got up?

Yes, sir.

Where was the coach when you got up?

When I got up?

Yes. Did you notice?
Yes, sir.
How far distant was it from you?
It must have been a hundred feet or a hundred steps.
Was it in motion?
Yes, sir; it was in motion.
The horses trotting or running?
They were running.
Did you observe—was the coach at that time in the road?
Yes, sir.
108 Was the coach at the time the passengers piled out—was it in the road squarely?
The time the passengers got out it was in the road.
Were both wheels on the grade?
Yes, sir.
Was the lower part of the coach directly in the road?
Yes, sir.
It didn't come off the grade?
No, sir.
Did you notice whether it got off the road?
No, sir; at no time did it get off the road.
In getting up did you notice the appearance of the coach?
Yes, sir.
Was there anything unusual in it?
Nothing, only the swinging of it.
Did you notice it jerking from side to side?
Yes, sir.
Whereabouts did you get on the coach?
At Hay's station.
109 There were three passengers on the deck of the coach besides yourself?
Yes, sir.
Do you know whether there was any drinking on the coach that day?
I didn't see any.
Did you notice the appearance of the driver?
Yes, sir.
State what it was.

Mr. ROBINSON: We object. We didn't ask him anything about the appearance of the driver.

Mr. DE WOLF: This same question came up yesterday, and Mr. Robinson read the deposition of a witness about the condition of the driver. Now, here is a witness who was on top of the coach and noticed the driver all the time. Certainly he would know more about the condition of the driver than two women at the house there, &c., &c. We claim to have the right to let his statement go to the jury.

110 Mr. ROBINSON: The gentleman seeks to prove something that is in direct violation of the rules of evidence, &c.

The COURT: What part of the evidence-in-chief would this be

cross-examination to? You have a right to call this witness to show that. And right here I am reminded that there is a matter I didn't rule on before—about striking out that evidence that Mr. Robinson didn't object to. That part will be stricken out.

Mr. De Wolf: After this accident occurred what became of the driver; did you notice?

Yes, sir. When the horses stopped he held the reins until some of us went—I went, for one—to help take care of the horses.

Did he sit up on the coach?

Yes. I think Merian went, for one. The driver stopped the coach at that little log house.

111 Before you got to him?

Yes, sir.

How far is that from the place of the accident?

It must be about 100 steps; I suppose something like that.

At what rate of speed was the coach driven at the time of the accident?

It was slow.

Going along slowly?

Yes, sir.

Did you observe the driving of the coach from where you got on?

Yes, sir.

What was the conduct? How was the driving?

It was as usual. I didn't see anything unusual about it.

Driven at an ordinary rate of speed?

Yes, sir; I thought so; I didn't see anything wrong about it.

I understood you to state that just at the time of the accident you passed a wood wagon?

Yes, sir.

Which road was the wood wagon on?

112 The lower road.

Did you notice what the wood wagon was hauled by?

Oxen.

You speak of the lower and upper roads. Which was the right-hand road?

The upper road.

You were on the right-hand track?

Yes, sir.

And the wood wagon was on the right-hand track in the direction it was traveling?

Yes, sir.

Which road was this pack animal on?

On the same road we were on.

Do you remember of meeting other teams on the route?

I think not. We stopped there to fix the tongue.

Do you remember of meeting other teams during the day?

I don't remember of meeting any, it has been so long ago.

That's all.

113 HOWARD H. ZENOR, called and sworn for the plaintiff, testified as follows:

Examined by Mr. ROBINSON:

State if you have been acquainted with Mr. Kennon since June, 1879.

Yes, sir.

Are you acquainted with the injury to his leg?

Yes, sir.

State if you was acquainted with his general health and physical ability to attend to business prior to the 30th of June, 1879.

Yes, sir.

And acquainted with him since?

Yes, sir.

State if there is any difference in his ability to attend to business. Before and since the accident?

Yes.

114 Well, the business we are engaged in at present—I consider Mr. Kennon of no account at all since the accident.

State if it necessitates the hiring of other help.

Yes, sir.

Mr. DE WOLF: That we object to. Not as to Mr. Kennon's condition, but we object as to the hiring of other help. It is too remote, &c.

(Objection sustained.)

Mr. ROBINSON: State as to Mr. Kennon's ability prior to his accident to attend to business.

Before that accident he was an able-bodied man and did considerable work about the store.

State as to his business qualifications.

*I*t think it is pretty fair.

You stated you were in the hardware business?

Yes, sir.

State the difference, if any, in Mr. Kennon's health and

115 general physical condition before and since the accident. If his general health has been injured outside of his leg being amputated.

I don't know whether — is or not; I am not able to judge. I don't think he is as strong a man as he was before he lost his leg.

That's all.

Cross-examined by Mr. DE WOLF:

How long have you been associated with Mr. Kennon in business?

I have been with him pretty nearly all the time for fifteen years.

Are you a partner of his?

Most of the time. I have been a full partner of his for the last ten years.

Except for the disability arising from his lameness he is as able to attend to all parts of the business as he ever was?

116 I don't see much difference. Outside of the manual labor, he is as good a business man as he was before. I don't see much difference; no, sir.

He can still attend to the correspondence and book-keeping as well since the accident as before?

He attends to the correspondence and keeps the books, but I don't consider him a reliable book-keeper.

Does he keep books as well now as before?

Before the accident he never kept the books at all.

It is only in the work and labor that requires strength is where he is injured?

Yes, sir. I don't consider him any account at all in the business we are in.

Well, does he, since the accident, attend more to clerical labor than before?

No, sir.

Well, you stated——

117 Yes, yes; more than before.

And does less of the other labor?

Yes, sir.

Does he keep the books of your firm entirely?

No, sir.

Does he attend to the correspondence entirely?

No, sir.

Did he before the accident.

No, sir.

That's all.

Plaintiff rests.

Dr. A. H. MITCHELL, called and sworn for defense, *and* testified as follows:

Examined by Mr. DE WOLF:

Dr., during the trip from here to Helena, did you notice the condition of the driver?

No, sir. I saw the driver, but did'nt see anything unusual about him.

Did he show the effects of drinking on the trip?

118 No, sir; I don't remember now any circumstances that led me to believe that he was any other than usual. He was a sort of boisterous man, anyway.

Did you know him?

Well, only from having ridden with him; I had no acquaintance with him.

Had his condition that day been such that he would have been incompetent to manage the stage team, would it have attracted your attention?

I was on the inside of the stage.

If the driver of the stage had been in such a condition of intoxication that he could scarcely keep his seat on the box of the coach while driving, would you have observed his condition?

No, sir; not unless I had seen him at the station. I was inside of the stage, with my back to the seat. I don't know now
119 anything that occurred to attract my attention. We were bowling along pretty well all day, and quite a crowd of us were in there talking. I was'nt at all alarmed or frightened.

Did you see him at the station where you changed horses?

I may have. I think I did, but I can't remember certainly.

Had he been in a state of drunkenness would it have attracted your attention?

I think so. If he had been very drunk I think I should have noticed it. The drivers always eat there, and if he sat down at the table I don't remember. I must have seen him in approaching and leaving the stage, but there was nothing to attract my attention.

If he had been in a state of intoxication would it have attracted your attention?

I think so; certainly. It would if I had seen him walk.
120 There was nothing I remember attracted my attention. He was a sort of a boisterous man and talked a good deal. I can remember nothing now that attracted my attention as to whether he was sober or drunk.

Cross-examined by Mr. ROBINSON:

State if there was whiskey aboard of the coach; if the passengers drank.

My impression is there was a bottle inside. I didn't drink myself and I don't remember. I think it is likely McCormick had a bottle.

SOLOMAN SPEAR, called and sworn for the defense, *and* testified as follows:

Examined by Mr. DE WOLF:

On the trip, from where you got on the stage up to the time of the accident, you was on the outside of the coach?

Yes, sir.

Did you notice the driver of the coach that day?
121 Yes, sir.

What was his condition as to sobriety?

I didn't see anything wrong with the man. He was a stranger to me.

Did you see him drunk at all during the trip?

I did not.

Nothing in his appearance or conduct to indicate drunkenness?

No, sir. If he was under the influence of liquor I didn't notice it.

Had the driver of the coach that day been in such a state of inebriety that he was scarcely able to sit on the coach would it have attracted your attention?

Yes, sir.

Was he in such a condition?

No.

Cross-examined by Mr. ROBINSON:

You don't know really whether he was drinking that day?
I didn't see him drink any.
He may have drank without your know——
122 He might. I didn't see him take any whiskey.
That's all.

SOLOMAN RIDDLE, called and sworn for the defense, *and* testified as follows:

Examined by Mr. DE WOLF:

Mr. Riddle, where do you reside?
In Deer Lodge.
How long have you lived here?
About six years.
What is your business?
Stageing.
How long have you been engaged in stageing business?
Thirty years.
In what States?
I first commenced in New York; from there I went to Texas and came up on the overland.
Have you been in the business for over thirty years steadily?
Yes, sir.
123 How long in Montana?
Since '66.
Have you driven stage in Montana?
Yes, sir.
What business were you in and where were you in June, 1879?
Stageing.
Did you have any connection with a stage line at that time owned by Gilmer and Salisbury, the defendants in this case?
Yes, sir.
Did you have any connection with the stages that run on the route from Deer Lodge to Helena?
Yes, sir.
What connection?
I had charge of it.
I will ask you if you know who was the stage-driver that drove the stage from Deer Lodge to Helena that left here on the 30th of June, 1879.
Yes, sir.
Who?
124 John Mantle.
Where is he now?
Dead.
Where did he die?
In Salt Lake.
How long had you known Mantle prior to that time?
Since '61.
Did you know his character and capability as a stage-driver?

Yes, sir.

State what his reputation as well as his capabilities were in that respect.

As good as I ever saw anywhere.

Had you known him since 61?

Yes, sir.

What business had he been engaged in from '61 to '79?

Driving.

Stage-driving?

Yes, sir.

How long had he been in the employ of Gilmer and Salis-
125 bury prior to the 30th of June, 1879?

He had worked for them pretty much all the while since they had the road. They bought the road in '69 or '70.

Did you run with Mantle when he was driving the stage?

Yes, sir.

What was his skill in the management of horses, or what is called a reinsman?

As good as I have seen anywhere.

Do you know the team of horses that were driven into Helena on the 30th of June, 1879?

Yes, sir.

Are you well acquainted with all those horses?

Yes, sir.

State all the horses in that team and their character, as to whether they were gentle and well broken.

They was all old stage horses. Some of them had been stageing until they was wore out—five or six years. There wasn't a
126 horse in the team that hadn't been stageing two years.

State what was the near horse.

It was a bay horse; the off was a buckskin.

Not so fast. Did the near one have a name?

Called him "Baby."

How long had he been stageing?

About two years.

What horse was the off horse.

A buckskin horse.

State the character of that horse.

He was just like any other horse. He had been worked until his knees spread out.

How long had he been worked?

I don't think as long as I have been on the line. I knew him three years. He staged till he was wore out. The near wheel horse was a gray horse. The off was a bay they bought of Larribe, in this town.

State if all these horses were gentle, well broken, and accustomed to their business.

127 Mr. ROBINSON: A little leading.

They were a well-broke stage team.

In your experience as a stageman—have you ever driven stages?

Yes; for 20 or 21 years.
Have you driven in Montana?
Yes, sir.
For a considerable time?
Yes, sir.
Have you, as a stage-driver, been accustomed to meeting pack animals?
Yes, sir.
Is it a frequent occurrence?
Oh, yes; very often.
State if it was more frequent in the year of 1879 than since.
Yes, sir. Yes.
I will ask you this question: A stage-driver at an ordinary rate of speed, with horses that were gentle and well-broken and accustomed to the road—a driver who was experienced and
128 skillful—seeing a pack animal coming towards the stage, with plenty of space and opportunity to turn out of the road, what would be the duty of the driver in exercising the utmost skill in securing the safety of passengers on board?

Mr. ROBINSON: We object.
The COURT: The witness stated he was a stage-driver.

Mr. DE WOLF: State what would be the duty of the driver to do under those circumstances to preserve the coach and passengers from harm.
I would have driven right along about my business.
Did you ever know the circumstances?

Mr. ROBINSON: What he did himself.

Mr. DE WOLF: Did you ever know of a driver under the circumstances I have stated doing anything else than remaining in the coach and driving along?
No, sir.
129 As a stage-driver accustomed to horses, I will ask you this question: Whether all horses or nearly all horses, whether well broken and gentle, do not at times become frightened.
Yes; all horses do.
Is it possible for a man to anticipate and foresee when the will become frightened?
No, sir.

130 Mr. ROBINSON: Don't lead the witness.

Mr. DE WOLF: This dun horse that worked in the off lead that day, where was that horse accustomed to work?
On the off lead.
Did you ever know that horse to work in any other place?
No, sir.
Except in the lead?
No, sir.
Do you know the first station this side of Helena?
Yes, sir.

What is it called?
Toll-gate.
Have you been at that station?
Yes, sir.
What is the distance from that station to the stage stable—from the house to the stage stable?
I don't know; it is quite a little piece over to the creek.
Can you approximate it?
131 Two or three hundred yards.
Is the road from the house to the stable a straight road; any bend in it?
The road runs pretty near straight, but there is a little cabin there that turns it off a little.
Is there a stream there?
Yes; with a little brush around it.
Could a person standing at that cabin see the stable?
I don't know. I never noticed that part of it.
Were you in Deer Lodge at the former trial of this case?
Yes, sir.
Do you remember where that dun or buckskin horse was at that time?
I think he was in town.
Who owned him?
I did.
Did you have him in charge?
Yes, sir.
At your stable?
132 Yes, sir.
Do you remember of that horse being driven about that time by Mr. Davis?
I don't know whether Davis drove the horse or not.
Where had the horse been kept some time prior to that time?
He has always been kept here.
Had he been driven shortly before the time Davis drove him?
I don't think he had been out of the stable for two or three weeks.
Been standing up?
In the stable; yes, sir.
Do you remember of Davis taking the horse out for the purpose of exercising him?
I believe he did drive him.
Did any accident occur?
Not that I know of.

Cross-examined by Mr. ROBINSON:

Don't you know that Davis and Piatt put that horse to a buggy and drove him out?
133 I don't know whether Davis drove him or not.
Well, one or the other. They went out in a buggy.
I think Davis drove the horse. I don't know who drove him.
They went out in a buggy?
I don't know. I didn't see them.

You didn't see them go out together?
No, sir.
Don't you know of Davis and Piatt driving that horse?
No, sir; I don't.
Didn't you tell me in Gerber's saloon in the month of last December that they did?
I didn't tell you anything about it.
You say you didn't tell me anything about it?
No, sir.
You didn't?
No, sir; I never saw them drive the horse.
134 Didn't you tell me that?
No, sir.
Don't you know that that horse broke that buggy up?
No, sir; I don't.
Didn't you tell me they did?
No, sir.
Didn't tell me anything about it?
No, sir; nothing about breaking the buggy at all.
You say, then, they didn't drive him out?
I didn't say that. I didn't see them drive him out together.
Didn't you? State whether or not they didn't drive that horse out.
I don't know.

Mr. DIXON: We object.
The COURT: He says he didn't see it; he may know it by hearsay.

Mr. ROBINSON: Didn't you tell them they had better be careful; tell Davis they better not drive that horse out?
I may have told him so.
Didn't you tell me you did?
135 I don't think I told you anything about that; about being careful of driving.
What condition did your buggy come back in?
I didn't see the buggy.
Didn't see it afterwards?
Yes, of course.
Didn't it come back with the tongue broken?
I didn't see it, I told you.
Wasn't the tongue broken?
Yes.
Wasn't it broken that day?
I don't know whether it was broken that day or not.
It wasn't broken when they went out?
I don't know.
Do you know of anything occurring to that buggy?
I didn't see it that day at all.
Did you see it after it came back?
I saw it next day.

136 You say you might have cautioned Davis not to drive that horse?

I didn't say that. I might have told him to be careful of the horse.

Didn't you object to his driving the horse out for reason that it wouldn't be safe?

I don't think so.

Didn't you tell me so?

No, sir.

Didn't you tell me anything about it?

I don't think I told you anything about it. I don't think that I told you anything. You may have imagined it.

While we were sitting in Gerber's saloon talking about the case didn't you tell me something about it?

I don't know that I did.

Did you?

No, sir.

Will you so testify?

I don't think I told you anything about it at all.

137 You might have forgotten.

I don't think I did.

You say it is two or three hundred yards from the station to the stable?

I think it is; I never measured it.

Are you certain it is one hundred and fifty yards?

No; I am not certain it is a hundred yards.

You were just guessing at it?

Yes, sir.

You are under the employ of Gilmer and Salisbury?

Yes.

You have taken an active part in working up this case—the defense?

I have nothing to do with it.

You have nothing to do with hunting up witnesses?

I may have got a witness or two.

Did you ever know of John Mantle drinking?

Mr. De Wolf: We object:

138 Mr. Robinson: It is as to his sobriety. I will ask you if Mantle was in the habit of drinking?

Mr. Dixon: We object to that. If they want to make him their witness, all right.

Mr. Robinson: You asked him about being a competent stage-driver?

Yes.

Mr. Robinson: Well, I will withdraw the question. That is all.

Hugh Kirkendall, called and sworn for the defense, *and* testified as follows:

Examined by Mr. DE WOLF:

Mr. Kirkendall, where do you reside?

At present in Butte.

How long have you lived there?

I have been there since the seventh; since the 27th of Dec. last.

How long have you lived in Montana Territory?

Since 1866.

I will ask you if you formerly knew a man by the name of John Mantle?

Yes, sir.

139 Where?

I knew him in Helena, Deer Lodge, and on the road from Corinne to Helena.

What is his business?

Stage-driving.

How long was he engaged in stage-driving?

I don't know how long; I know he had been driving two or three years in this country.

You have known him since '66?

No, sir; I have not.

Do you know what his reputation was as a stage-driver?

Yes; I do.

Well?

It was A No. one.

Do you know or were you acquainted with a team of horses that was driven in the month of June, 1879, from the toll-gate this side of Helena, on the stage road?

Yes, sir.

Do you know the horses in that team?

Yes, sir.

140 Do you know what horses were worked in the lead of that team?

Yes; I know the pair of horses that was worked in the team that was run into Helena before this for two or three years.

Did you know the names of the horses?

Yes.

What?

The bay horse's name on the nigh lead was called Baby, and there was a buckskin horse, a cream horse, the color of smoked buckskin.

How long had these horses been driven in the stage?

I don't know how long. I have seen them at least two years before this. I have seen them drove three years. I have seen the bay horse four years. I have driven them.

What is their character as stage-horses?

I considered them the finest pair of leaders I ever handled. The bay horse can't be beat in Montana.

141 Were they well broken?

Yes, sir; they were.

Cross-examined by Mr. NAPTON:

Were you driving stage over there?

No, sir.
How many times did you drive these horses?
Twice. About a mile each time.
Are you a skillful driver?
Well, I don't know whether I am.
You are little modest about it?
I can drive four horses.
Doesn't a driver think the finest horses he can get are the wildest?
What I consider a fine stage horse is a horse that will drive up prompt on the bit all the time and keep up on the road and is easy reined.
Horses that will pull against the bit all the time?
142 Yes; steady and not try to run.
That's all.

HORACE E. WATSON, called and sworn for the defense, *and* testified as follows:

Examined by Mr. DE WOLF:

What is your first name?
Horace E.
Where do you reside?
In Idaho now.
What is your business?
Stage business.
How long have you been engaged in stage business?
Since '73.
Whereabouts have you pursued that business?
Well, pretty much all over this Territory and in Idaho.
Have you driven stage in this Territory?
Yes, sir.
At what places?
Between here and Missoula; between Butte and Gaffneys, and Virginia City and Salisbury.
143 Where was you in the month of June, 1879?
I was riding as messenger from the terminis of Utah and Northern.
In whose employ?
The Pacific Express.
Did you know John Mantle?
Yes, sir.
What was his business?
He was a stage-driver.
Did you know his reputation as a stage-driver?
It was No. one as a stage-driver; considered one of the best.
Have you rode with him?
Yes, sir.
What did you consider him?
I considered him a good stage-driver.
Do you know where he is now?
He is dead, I have heard.

Where did he die?
In Salt Lake.
Do you know or did you know a team of horses that were
144 driven on the stage line of Gilmer and Salisbury from Helena to the first station this side in 1879?
Yes, sir.
Did you know a team that was driven there at the time this accident occurred?
Yes, sir.
Were you acquainted with the horses?
Yes, sir.
Have you driven them yourself?
I don't think that I have.
Did you ever ride behind them?
Yes.
Often?
Frequently.
Do you know what horses were driven in the lead of that team?
Yes, sir.
Describe them.
The near one was a bright bay horse that weighed 1,075; the horse weighed just 1,069 when they bought him.
145 How long had that horse been driven in a stage prior to this time?
I can't state positively; I think about four years.
Where did they buy him?
At Silver Bow or Butte. I brought him from Silver Bow.
What horse was driven with him?
A buckskin horse.
Do — know that horse?
Yes, sir.
Have you rode behind him?
Yes, sir.
State his character as a stage-horse.
He was considered a good leader and a good stage-horse.
Was he gentle and well broken?
Yes; he was.
I will ask you if at any time in your experience as messenger or otherwise if any accident occurred?
Yes, sir.
State what that accident was.
146 Going from Ten-Mile station into Helena there was three stages of us nearly side by side—an opposition line from Butte, the main overland line, and the other line from Butte. Mantle was driving the line from Butte and I was riding with him. He holloaed to the others, "Look out, I am going to pass you." I was sitting on the seat beside him and had my double-barreled gun, with the muzzle on the foot-board. Pretty soon we struck a stone and *and* turned one barrel off, boared a hole through the foot-board, and shot a leader.
Were you going at a good rate of speed?

Yes, sir.
You shot a horse?
Yes, sir.
Did you disable the horse?
Yes; for some time.
That was about what occurred?
Yes, sir.
These two horses at that time were in the same team?
147 Yes; in the same team.
Did the horses appear or were they frightened at that time?
No, sir; not much. The driver could control them very easily and hold them up. They went about one hundred yards, and the horse I shot commenced limping.
Is it of frequent occurrence to meet pack animals on the road?
I don't think that it was, although I have met them.
I will ask you this question: From your knowledge and experience of stages and stage-horses, take a team that is accustomed to stage use, an experienced driver, traveling at an ordinary rate of speed, and, seeing a pack animal, loaded with a pack, surmounted with a buffalo robe, coming towards the stage at a place in the road where there was a convenient place to turn out, what would be the
148 duty of the driver under these circumstances in order to preserve the safety of the coach and passengers?
I consider it his duty to sit on the seat and keep the team moving; not hold them up, but to keep the team going and pass them.
Would stopping the team under those circumstances tend to produce an accident rather than prevent one?
Yes, sir.

Cross-examined by Mr. ROBINSON:

Are you in the employ of the defendants in this case?
Yes, sir; I am at present.
How long have you been in their employ?
For six or seven years.
That's all.

CHRIS. KOUBA (KASSUBA), called and sworn for the defense, *and* testified as follows:

Examined by Mr. DE WOLF:

Where do you reside?
149 Well, I live most anywheres.
What is your business?
I am stageing.
How long have you been driving stage?
About twenty-five years, I guess.
How long have you driven stage in Montana?
Since 67, more or less.
Where were you driving in the month of June, 1879?
I was driving from Helena to Butte, I think.

Did you know a stage team at that time that was driven from Helena to the first station this side?

Yes, sir.

Have you ever driven that team?

Yes, sir.

Describe the horses in that team?

150 Well, there was two grays, a bay, and a buckskin.

What horses were driven on the lead?

The bay and buckskin.

Did you know the horses?

Oh, yes.

Did you ever drive them?

Yes.

Where?

I drove them on this road and on the overland.

Do you know what position these horses kept on the lead?

Yes.

Which was driven on the near lead?

The bay horse.

Was he always driven there?

Yes, I believe he was broke on that side.

The buckskin was on the off side?

Yes.

Was the buckskin driven on any other part of the team?

151 No, I don't think so; maybe I have driven him on the near side; not much, though.

You were well acquainted with the horses?

Yes.

State what the character of the horses were. Were they well broken?

They ought to be; they were driven long enough.

How long had the bay horse been driven?

Some four or five years.

How long had the buckskin horse been driven?

About three, I think.

From your experience with them were they not well-broken horses?

I always called them a pretty good team.

Did you consider them well broken?

Yes, sir.

Considered them suitable for their business?

Yes, sir.

152 Have you in your experience in Montana in stage-driving often met pack animals?

Yes, sir; I have.

I will ask you this: Take a stage and stage horses that are well broke and accustomed to being driven in a stage and an experienced stage driver, se-ing a pack animal coming towards the stage, surmounting the pack with a buffalo robe, where there is space for the pack animal to turn out of the road, what is the duty of the driver to insure the safety of the coach and passengers?

I would go ahead if I could.

What would be the ordinary effect of stopping the coach under these circumstances?

I wouldn't stop if I could help it.

Would it be more likely to produce an accident by stop-
153 ping than by going on?

You would be liable to have an accident by stopping.

Did you know John Mantle?

Yes, sir.

What was his business?

Driving stage.

Do you know his reputation as a stage driver?

He was called a good driver.

In driving or handling these horses did you ever have any accident?

No, sir.

Mr. ROBINSON: I object to it, whether he had any accident or not.

Mr. MAYHEW: I think it is a pertinent question.

The COURT: What is the objection?

Mr. ROBINSON: I withdraw it.

The COURT: Objection overruled.

154 WITNESS: I never had any accident.

Did you ever have any trouble with them?

No; not to amount to anything; not any more than with the balance of them.

How were these horses in regard to scareing?

They was not bad.

Were they different from ordinary stage teams?

I couldn't see any difference in them.

That's all.

Cross-examined by Mr. ROBINSON:

You think this buckskin horse wasn't worse than any other?

No.

He would shy and jump sometimes?

Most any horse will do that.

A good many horses won't.

Oh, yes, they will.

Wasn't he a little worse than most horses?

No; not when I was driving.

When was you driving?

155 On the Overland and Deer Lodge.

Before or after the accident?

Before.

How long before?

I drove them that spring.

The spring before the accident?

Yes.

You are working for Gilmer and Salisbury?

Yes.

Are you working for them now?
Yes.
That's all.

Defense rests and testimony closed.

The above and foregoing was the whole of the evidence offered and admitted in said cause, and to the ruling of the court admitting the depositions of Catherine and Millie C. Goodell and George H. Piatt to be read in evidence against the objections of defendants defendants, by their counsel, duly excepted and afterwards filed their bill of exceptions, as follows:

156 (Court.)

(Title of Cause.)

Be it remembered that in the above cause the defendants filed therein a motion for a change of venue, on the ground that an impartial trial could not be had of said cause in the county of Deer Lodge, and in support of said motion filed and read the affidavit of Solamon Riddle.

(Insert affidavit and counter-affidavit of R. T. Kennon.)

For affidavits of Solomon Riddle & Richard T. Kennon see pages "21" and "23" of this transcript.

The court reserved its decision of said motion until the 15th day of December, 1882, until a jury had been drawn and examined on their "*voir dire*," and, a jury having been obtained, the court thereupon overruled said motion for a change of venue; to which ruling of the court the counsel for the defendants then and there excepted.

Afterwards, on the trial of said cause, on the 15th day of December, 1882, the plaintiff produced and offered to read in evidence to the jury the depositions of Catherine Goodell and Millie C.
157 Goodell (as contained in the statement on appeal herein); to the reading of which depositions and the whole thereof defendants, by their counsel, then and there objected on the grounds that said depositions were immaterial and irrelevant. The court overruled the objections and allowed said depositions to be read to the jury. To the order of the court overruling said objections and in allowing said depositions to be read counsel for defendants then and there excepted.

That on said 15th day of December, 1882, on the trial of said cause, plaintiff produced and offered to read in evidence to the jury the deposition of Georgo H. Piatt; to the reading of which and the several interrogatories and answers contained therein defendants, by counsel, then and there objected on the ground that said depositions and the several interrogatories and answer- contained therein were immaterial and irrelevant.

158 The court overruled said objection- and each and every of them and admitted said deposition and the several interrogatories and answers contained therein to be read in evidence to the

jury; to which order of the court overruling said objections and in admitting said deposition to be read in evidence defendants, by their counsel, then and their excepted.

Defendants, by their counsel, now tender this their bill of exceptions to the several orders and rulings of the court above named and ask that the same be allowed and signed by the judge of the court.

(Signed) WM. J. GALBRAITH, *Judge.*

The court then charged the jury and gave the following instructions at the request of plaintiff, namely:

1st. This is an action for damages for injuries done to the
159 plaintiff while he was a passenger on defendants' coach on the 30th day of June, 1879, and the defendants are charged as common carriers of passengers. For and in such an action it is necessary to instruct the jury as to the liability of defendants as such common carriers and the amount and extent of caution the law requires of them to avoid liability in case of injury to passengers.

2nd. You are instructed that the defendants, by their answer, admit that they were, on the 30th day of June, 1879, such common carriers of passenger- for hire, and that plaintiff was on said day and when injured a passenger on one of defendants' coaches and had paid his fare and was injured while jumping from defendants' coach, and they also admit that plaintiff was injured and that his leg was broken, and from which break it became necessary to amputate the same, and was thereby subjected to the necessity of medical
160 and surgical treatment, and no proof by plaintiff was required as to any of said matters.

4th. The defendants as such common carriers of passengers for hire are not insurers of the life or personal safety of their passengers, but are bound to exercise the highest or greatest degree of precaution and care in every respect in providing for the safety and safe transportation of their passengers while on their coaches.

5th. The jury, for the purpose of determining the negligence of defendants in causing the injuries complained of, are instructed that the contract of common carriers of passengers is to carry safely, and by this term the testimony in the case must show that the defendants had a competent driver, a safe coach, gentle and safe horses, good and safe harness, and the team properly and safely hitched to the coach or vehicle, and all other acts contributing towards the safety of the passengers. The utmost care and skill which
161 prudent men are accustomed to use under simular circumstances is demanded of defendants by the law in this case. If the driver did anything, if the horses did anything, which caused the injury to plaintiff, and it could have been avoided by the utmost care or caution on the part of the driver, then you will find a verdict for plaintiff and assess his damages, unless you further find that plaintiff contributed to the injury received by his own negligence.

6th. Said defendants being bound by law to exercise such precaution, care, and diligence in such case as you have been instructed,

then if you find from the evidence that the meeting of a pack animal, with pack and buffalo-robe on it, started the stage team and caused said coach to be thrown in such a position and situation as to cause plaintiff to jump from said coach and thereby receive the injury complained of, then it is for you to consider whether or not the failure of the driver of said coach to stop said coach
162 or to use some precautionary measures against said coach team being frightened by said pack animal, and if you find he did not do so it is for you to find and determine as a question of fact whether or not said failure so to do by said driver was not negligence on his part, and if he was negligent therein defendants are liable and the jury will find for plaintiff.

7th. It is admitted by the pleadings in this case that the plaintiff, on or about the 30th of June, 1879, was a passenger on one of defendants' coaches, and it is further admitted that defendants were common carriers of passengers for hire, and it is further admitted that plaintiff had paid his fare; then the law exacts from the defendants the utmost care and skill *of* which prudent men are accustomed to use under simular circumstances, and this means the highest degree of care, skill, and caution on the part of
163 def'ts and their employees and agents, and if the jury believes from the evidence that the plaintiff, as a reasonable man, was actuated by great fear of bodily harm by remaining on said coach and was compelled by such fear to jump from said coach of def'ts to save himself from what he believed, as a reasonable man, great bodily harm or from loss of life or limb, or was in reasonable apprehension of such injury, then plaintiff had the right to jump from the coach and defendants were liable to him for damages if the jury do not further find that plaintiff contributed to his injuries or that the def'ts showed the character of diligence above stated.

8th. If plaintiff Kennon believed, as a reasonable man, that his life or limbs were in danger at the time he jumped from the coach, then he had a right to jump, and such act was not contributory negligence on his part.

164 9th. If the jury find for plaintiff—that is, if they find he is entitled to recover at all, they will then proceed to assess the damages, and in so doing they will consider two questions as to damages as claimed, to wit:

General damages to the extent of $25,000.00 and special damages to the extent of $750.00. As to the latter he is entitled to as much as he has proved to have paid out and expended for medical and surgical treatment, medicine, nursing, and other and all expenses occasioned by reason of said injury, not to exceed $750.00.

And as to the former—that is, such general damages claimed, $25,000.00—in assessing the same the jury will assess the same in such sum as will compensate plaintiff for the injury received, and in so doing may take into consideration his bodily and mental pain and suffering, both taken together, but not his mental pain
165 alone, the inconvenience to him of being deprived of his leg, and loss of time and inconvenience of attending to his business generally from the time of the injury to the present time as

such plaintiff may have proved and the jury are satisfied, to a reasonable certainty, inevitably and necessarily resulted from the original injury.

10th. Drivers, stock-tenders, or superintendents, and all other agents of def'ts must be competent and exercise the highest degree of care and caution in their respective departments, and if the jury believe from the evidence that negligence of either one of them or of def'ts, through their agents, in any respect caused the injury to plaintiff, they will find for pl'ff and assess his damages.

The court also gave the following instructions at the request of defendants:

1st. In this action plaintiff claims damages for injuries sustained by him while a passenger upon defendants' stage coach be-
166 tween Deer Lodge & Helena in June, 1879.

Plaintiff claims that he sustained such injuries by reason of the negligence and want of care of defendants in not furnishing a safe and competent driver and safe and suitable horses for said coach and in not properly managing the same; that thereby the coach was thrown into such a position that plaintiff, having sufficient cause, as a reasonable and prudent man, to believe, in his situation and under the circumstances, that it was necessary to leave the coach to escape great injury to life or limb, jumped from the coach, and in so doing received the injuries complained of.

2nd. The defense of the defendants is:

First. That they used all the care and caution to convey plaintiff safely which the law required of them as common carriers of passengers; that the accident was not due to any negligence or want of care upon their part, but was occasioned by causes beyond
167 their control and for which they are not responsible in law; and,

Second. That plaintiff contributed directly to the injuries he sustained by his negligence in jumping from the coach under circumstances in which a reasonable and prudent man in his situation would have remained in the coach and not jumped from it at the time plaintiff did. Defendants also deny that pl'ff has sustained the damages he claims or any damages by their acts.

3rd. The immediate cause of the injury alleged by plaintiff having been his jumping from the coach, you are instructed that the burden of truth in this case is upon plaintiff to prove the negligence of the defendants, and also to prove that plaintiff in jumping from the coach acted as a reasonable and prudent man should have done in his situation and under the circumstances and did
168 not by any want of reasonable prudence or caution on his part contribute to the injuries he received.

If the jury find from the evidence that plaintiff has failed to establish either of these matters by a preponderence of evidence, then they will find a verdict for the defendants.

4th. Carriers of passengers for hire are not insurers of the lives or safety of those they carry, and are liable only for such injuries as occur from car-lessness or the omission of some duty devolving on

them. Before the jury will be justified in giving any verdict for damages against defendants they must be satisfied that the injuries to the plaintiff resulted from the car-lessness, negligence, or the omission of some duty on the part of the defendants, their agents or employees.

5th. The fact that plaintiff received the injuries complained of while a passenger on defendants' stage is not in and by itself sufficient to raise a presumption of negligence on the part of de-
169 fendants, and unless all the circumstances attending the accident to the coach establishes the negligence of defendants your verdict should be for the defendants.

6th. The law imposes on the carriers of passengers for hire the utmost prudence and care for the safety of passengers. By this expression is meant that they must exercise the prudence, skill, and care of a prudent person engaged in the same pursuit. It does not mean that they must at their peril adopt every precaution which might by possibility prevent accident or injury, for that would be impracticable and would impose obligations about things that could not be foreseen and could not therefore be guarded against.

7th. The law requires of all common carriers of passengers for hire, and required of defendants in this case in the conveyance of plaintiff, the exercise of the utmost care and skill which prudent men are accustomed to use under similar circumstances, but
170 this rule is not to be pressed to an extent which would make the conduct of the business so expensive as to be wholly impracticable, nor does the rule require that the carrier must adopt all the precautions that an ingeneous mind or scientific skill could suggest, nor that he must use all the precautions which after an accident has happened it can be seen would have been sufficient to avoid it, nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur. The carrier must have all the skill which is possessed by men whose services it is reasonably practicable for him to secure. A carrier is not an insurer of his passenger and does not warrant his safety and is not responsible for injuries unless they are occasioned by the carrier's negligence in failing to use such care and skill as the law requires of him, as above stated.

171 It is sometimes stated as the rule that the carriers must provide for the saftey of his passenger as far as human care and foresight will go, but this rule is to be taken with the qualifications above stated, and it does not mean that the carrier will be required to exercise all the care and diligence of which the human mind can conceive or all the skill and ingenuity of which it is capable nor such as will render the transportation free from any possible peril nor such as will drive the carrier from his business.

It does not, for instance, in the case of carriers by rail, require, with respect to either passenger or freight trains, steel rails or granite or iron cross-ties because such ties are less liable to decay, and hence safer than those of wood, nor upon freight trains air brakes, bell pulls, and a brakeman upon every car, but it does emphatically require everything necessary to the security of the

passenger on either and reasonably consistent with the business of the carrier and the means of conveyance employed, and that the highest degree of practicable care, diligence, and skill be adopted that is consistent with the mode of transportation used and will not render its use impracticable or inefficient for the intended purpose. The passenger takes upon himself such risks of travel as are incident to the mode of travel he adopts and against which the utmost care and skill of prudent carriers under similar circumstances will not protect him.

8th. If, therefore, the jury believe from the evidence that the defendants, in the conveyance of plaintiff, exercised the utmost care and skill which prudent stage-coach owners and proprietors are accustomed to use in the running and managing of stage-coaches for the conveyance of passengers upon a road such as the one between Deer Lodge and Helena, then they will find for the defendants.

9th. Defendants were not bound to provide against every possible peril to plaintiff, nor to employ such extraordinary, or expensive, or unusual safeguards against dangers which were possible, but not probable, as would render their carrying of passengers unreasonably expensive, or slow, or inconvenient to their passengers; nor are they to be held responsible for not providing against an accident not reasonably to be apprehended in the same manner as they should have done if they had known beforehand that it was likely to occur.

10th. While it is the duty of the carrier of passengers by stage-coach to provide for the coach a competent and skilful driver and safe and suitable horses, such carrier having done this does not warrant that such driver shall, under all circumstances, in case of an accident, do what may afterwards be shown to be the best thing to do, nor that such horses will not under any possible circumstances become frightened or unmanageable.

The obligations of a carrier are only to provide a driver and horses such as prudent stage-coach owners or proprietors of the utmost care and skill are accumstomed to employ, and the horses which the carrier is required to employ are such as are suitable for the purpose, having regard for the usual rate of speed and other matters, and such as are safe in the hands and under the management of a competent or skilful driver, although they might not be considered suitable or safe for an inexperienced person or child to drive.

11th. If the jury believe from the evidence that the coach on which plaintiff was being conveyed when he was injured was furnished with a driver whom prudent stage-coach proprietors of the utmost care and skill would employ as competent and skilful and horses such as like stage-coach proprietors would use as suitable and safe in the hands of such a driver, and that the driver at the time of the occurrance was in the exercise of the usual care and skill of a prudent and skilful driver, then the defendants were not guilty of negligence, and the jury will find for the defendants.

12th. It is incumbent on the plaintiff in actions of this kind to

establish to the satisfaction of the jury the negligence of the carrier before he is intitled to recover, and in determining the question of negligence on the part of the defendants the jury should take into their consideration the mode of conveyance, the route travelled over, and all the circumstances attending the accident, and if from all these the negligence of the defendants is not established the verdict of the jury should be for the defendants.

176 13th. If the jury believe from the evidence that the accident to the coach at the time plaintiff was injured was not occasioned by any want of competence or skill of the driver or by the use of any horses which prudent stage-coachmen of the utmost care and skill would consider unsuitable or unsafe, but was occasioned by the sudden fright of a suitable and safe horse or horses without fault or negligence of the driver, then the jury will find for the defendants.

14th. Contributory negligence is some act or the omission of proper care on the part of the person injured without which the injuries would not have been received. Passengers, being endowed with reason and intelligence, are bound to the exercise of prudence and care for their own safety. If they fail to exercise such reasonable prudence and care and injuries result the carrier will not be liable.

177 15th. If the jury believe from the evidence that at the time plaintiff jumped from the coach a reasonable and prudent man in the same situation and circumstances would not have done so, but would have considered it safer to remain in the coach, then the jury will find for the defendants; and in considering whether plaintiff in so jumping from the coach acted as a reasonable and prudent man would have done the jury will consider all the circumstances in evidence, such as whether or not plaintiff should not have got out of the coach before he did and when other passengers did, the rate of speed at which the coach was moving when he jumped out, plaintiff's condition as to health, strength, activity, and age, and all other matters in evidence what might be reasonable and prudent for one man or under certain circumstances might not be so for another man or under other circumstances. It might be

178 reasonable and prudent for a young, strong, and active man to jump from a coach in motion and very imprudent and unreasonable under the same circumstances for an old, weak, sick, or inactive man to attempt to do so.

16th. If the jury believe from the evidence that plaintiff contributed to the injury he received by jumping from the coach when a reasonable and prudent man would not have done so, then they will find for the defendants, even if they find that defendants were guilty of negligence in placing the coach in the condition it was in when plaintiff jumped from it. The rule of law is that although one party may have been guilty of negligence that does not relieve the other party from the obligation of exercising reasonable care and prudence to avoid injury, and if the party injured has contributed to the injury by any negligence on his part he cannot recover.

17th. If the jury find that the plaintiff is entitled to recover

179 any damages in this action they must give him such damages only as will compensate him for the injuries received. They are not at liberty to guess at the damages or to give speculative damages; nor can they give in this case what are called exemplary or vindictive damages to punish the defendants or to reward the plaintiff.

18th. The jury are to consider only the evidence given in the case and nothing outside of it, and as to the law applicable to the case are to be governed by the instruction of the court.

The court also gave the following instructions of its own motion:

A witness is presumed to speak the truth. This presumption, however, may — repelled by the manner in which he testifies, by character of his testimony, by his motives, or by contradictory evidence, and you are the sole and exclusive judges of his credibility.

180 To — giving the several instructions which the court gave upon the request of plaintiff the defendants duly excepted before said cause was submitted to the jury and filed *his* bill of exceptions thereto, which was allowed and signed by the judge of said court and was as follows:

(Court.)

Title of Cause.

Be it remembered that on the trial of this action the court, at the request of plaintiff, gave the jury the following instructions, to wit;

4th. The defendants, as such common carriers of passengers for hire, *and* not insurers of the life or personal safety of their passengers, but are bound to exercise the highest or greatest degree of precaution and care in every respect in providing for the safety and safe transportation of their passengers while on their coaches.

181 5th. The jury, for the purpose of determining the negligence of defendants in causing the injuries complained of, are instructed that the contract of common carriers of passengers is to carry safely, and by this term the testimony in the case must show that the defendants had a competent driver, a safe coach, gentle and safe horses, good and safe harness, and the team properly and safely hitched to the coach or vehicle, and all other acts contributing towards the safety of the passengers. The utmost care and skill which prudent men are accustomed to use under similar circumstances is demanded of defendants by the law in this case. If the driver did anything—if the horses did anything—which caused the injury to plaintiff and it could have been avoided by the utmost care or caution on the part of the driver, then you will find

182 a verdict for plaintiff and assess his damages, unless you further find that plaintiff contributed to the injury received by his own negligence.

6th. Said defendants being bound by law to exercise such precaution, care, and diligence in such case as you have been instructed, then, if you find from the evidence that the meeting of a pack ani-

mal with pack and buffalo robe on it started the stage team and caused said coach to be thrown in such a position and situation as to cause plaintiff to jump from said coach and thereby receive the injury complained of, *then* it is for you to consider whether or not the failure of the driver of said coach to stop said coach or to use some precautionary measures against said coach team being frightened by said pack animal, and if you find he did not do so
183 it is for you to find and determine as a question of fact whether or not said failure so to do by said driver was not negligence on his part, and if he was negligent therein defendants are liable and the jury will find for plaintiff.

7th. It is admitted by the pleadings in this case that the plaintiff, on or about the 30th of June, 1879, was a passenger on one of defendants' coaches, and it is further admitted that defendants were common carriers of passengers for hire, and it is further admitted that plaintiff had paid his fare; then the law exacts from the defendants the utmost care and skill of which prudent men are accustomed to use under similar circumstances, and this means the highest degree of care, skill, and caution on the part of def'ts and their employees and agents; and if the jury believe from the evi-
184 dence that the plaintiff as a reasonable man was actuated by great fear of bodily harm by remaining on said coach, and was compelled by said fear to jump from said coach of def'ts to save himself from what he believed as a reasonable man great bodily harm or from loss of life or limb, or was *on* reasonable apprehension of such injury, then plaintiff had the right to jump from the coach, and defendants *were* liable to him for damages, if the jury no not further find that plaintiff contributed to his injuries or that the defendants showed the character of diligence above stated.

8th. If plaintiff Kennon believed as a reasonable man that his life or limbs were in danger at the time he jumped from the coach, then he had a right to jump, and such act was not contributory negligence on his part.

185 9th. If the jury find for plaintiff—that is, if they find that he is entitled to recover at all—they will then proceed to assess the damages, and in so doing they will consider two questions as to damages as claimed, to wit, general damages to the extent of $25,000.00, and special damages to the extent of $750.00. As to the latter, he is entitled to as much as he has proved to have paid out and expended for medical and surgical treatment, medicine, nursing, and other and all expenses occasioned by reason of said injury, not to exceed $750.00.

And as to the former—that is, such general damages claimed, $25,000.00—in assessing the same the jury will assess the same in such sum as will compensate plaintiff for the injury received, and in so doing may take into consideration his bodily and mental pain and suffering, both taken together, but not his mental pain
186 alone, the inconvenience to him of being deprived of his leg, and loss of time and inconvenience in attending to his business generally from the time of the injury to the present time, as such, plaintiff may have proved and the jury are satisfied, to a

reasonable certainty, in-vitably and necessarily resulted from the original injury.

10th. Drivers, stock-tenders, or superintendents, and all other agents of def'ts must be competent and exercise the highest degree of care and caution in their respective departments, and if the jury believe from the evidence that negligence of either one of them or of def'ts through their agents in any respect caused the injury to plaintiff, they will find for plaintiff and assess, his damages.

To the giving the jury by the court of each and all of said instructions, both as a whole and to each one separately, defendants by their counsel objected at the time for the reasons—

187 First. That said instructions do not, as a whole, nor does any or either of them, correctly state the law applicable to and which should govern the case.

Second. That said instructions and each of them are irrelevant.

Third. That said instructions and each of them are in conflict with and contradictory of the instructions given by the court to the jury at the request of defendants, and which are as follows, to wit:

1st. In this action plaintiff claims damages for injuries sustained by him while a passenger upon defendants' stage coach between Deer Lodge & Helena in June, 1879.

Plaintiff claims that he sustained such injuries by reason of the negligence and want of care of defendants in not furnishing a safe and competent driver and safe and suitable horses for said

188 coach, and in not properly managing the same; that thereby the coach was thrown into such a position that plaintiff, having sufficient cause, as a reasonable and prudent man, to believe in his situation and under the circumstances, that it was necessary to leave the coach to escape great injury to life or limb, jumped from the coach and in so doing received the injuries complained of.

2nd. The defense of the defendants is—

First. That they used all the care and caution to convey plaintiff safely which the law required of them as common carriers of passengers; that the accident was not due to any negligence or want of care upon their part, but was occasioned by causes beyond their control, and for which they are not responsible in law, and—

Second. That plaintiff contributed directly to the injuries he sustained by his negligence in jumping from the coach

189 under circumstances in which a reasonable and prudent man in his situation would have remained in the coach and not jumped from it at time plaintiff did. Defendants also deny that pl'ff has sustained the damages he claims or any damages by their acts.

3rd. The immediate cause of the injury alleged by plaintiff having been his jumping from the coach, you are instructed that the burden of proof in this case is upon plaintiff to prove the negligence of the defendants, and also to prove that plaintiff, in jumping from the coach, acted as a reasonable and prudent man should have done in his situation and under the circumstances, and did not, by any want of reasonable prudence or caution on his part, contribute to the injuries he received.

190 If the jury find from the evidence that plaintiff has failed to establish either of these matters by a preponderance of evidence, then they will find a verdict for the defendants.

4th. Carriers of passengers for hire are not insurers of the lives or safety of those they carry, and are liable only for such injuries as occur from carelessness or the omission of some duty devolving on them. Before the jury will be justified in giving any verdict for damages against defendants they must be satisfied that the injuries to the plaintiff resulted from the carelessness, negligence, or the omission of some duty on the part of the defendants, their agents or employees.

5th. The fact that plaintiff received the injuries complained of while a passenger on defendants' stage is not in and by itself sufficient to raise a presumption of negligence on the part of de-
191 fendants, and unless all the circumstances attending the accident to the coach establishes the negligence of defendants your verdict should be for the defendants.

6th. The law imposes on the carriers of passengers for hire the utmost prudence and care for the safety of passengers. By this expression is meant that they must exercise the prudence, skill, and care of a prudent person engaged in the same pursuit. It does not mean that they must, at their peril, adopt every precaution which might by possibility prevent accident or injury, for that would be impracticable and would impose obligations about things that could not be foreseen and could not therefore be guarded against.

7th. The law requires of all common carriers of passengers for hire, and required of defendants in this case in the conveyance of plaintiff, the exercise of the utmost care and skill which
192 prudent men are accustomed to use under similar circumstances, but this rule is not to be pressed to an extent which would make the conduct of the business so expensive as to be wholly impracticable, nor does the rule require that the carrier must adopt all the precautions that an ingeneous mind or scientific skill could suggest, nor that he must use all the precautions which, after an accident has happened, it can be seen would have been sufficient to avoid it, nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur. The carrier must have all the skill which is possessed by men whose services it is reasonably practicable for him to secure. A carrier is not an insurer of his passenger and does not warrant his safety and is not responsible for injuries, unless they are occasioned by the carrier's negligence in failing to use such care and
193 skill as the law requires of him as above stated. It is sometimes stated as the rule that the carrier must provide for the safety of his passenger as far as human care and foresight will go, but this rule is to be taken with the qualifications above stated, and it does not mean that the carrier will be required to exercise all the care and diligence of which the human mind can conceive, or all the skill and ingenuity of which it is capable, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business. It does not, for instance, in the

case of carriers by rail, require with respect to either passenger or freight trains steel rails or granite or iron cross-ties, because such ties are less liable to decay, and hence safer than those of wood, nor upon freight trains air-brakes, bell-pulls, and a brakesman upon every car, but it does emphatically require everything neces-
194 sary to the security of the passenger on either and reasonably consistent with the business of the carrier and the means of conveyance employed, and that the highest degree of practicable care, diligence, and skill be adopted that is consistent with the mode of transportation used, and will not render its use impracticable or inefficient for the intended purpose. The passenger takes upon himself such risks of travel as are incident to the mode of travel he adopts and against which the utmost care and skill of prudent carriers under similar circumstances will not protect him.

8th. If, therefore, the jury believe from the evidence that the defendants in the conveyance of plaintiff exercised the utmost care and skill which prudent stage-coach owners and proprietors are accustomed to use in the running and managing of stage coaches
195 for the conveyance of passengers upon a road such as the one between Deer Lodge and Helena, then they will find for the defendants.

9th. Defendants were not bound to provide against every possible peril to plaintiff, nor to employ such extraordinary or expensive or unusual safeguards against dangers which were possible, but not probable, as would render their carrying of passengers unreasonably expensive or slow or inconvenient to their passengers, nor are they to be held responsible for not providing against an accident not reasonably to be apprehended in the same manner as they should have done if they had known beforehand that it was likely to occur.

10th. While it is the duty of the carrier of passenger by stage coach to provide for the coach a competent and skilful driver and safe and suitable horses, such carrier, having done this, does not warrant that such driver shall under all circumstances in case
196 of an accident do what may afterwards be shown to be the best thing to do, nor that such horses will not under any possible circumstances become frightened or unmanageable.

The obligations of a carrier are only to provide a driver and horses such as prudent stage-coach owners or proprietors of the utmost care and skill are accustomed to employ.

And the horses which the carrier is required to employ are such as are suitable for the purpose, having regard for the usual rate of speed and other matters, and such as are safe in the hands and under the management of a competent or skilful driver, although they might not be considered suitable or safe for an inexperienced person or child to drive.

11th. If the jury believe from the evidence that the coach
197 upon which plaintiff was being conveyed when he was injured was furnished with a driver whom prudent stage-coach proprietors of the utmost care and skill would employ as competent and skilful, and horses such as like stage-coach proprietors would use as suitable and safe in the hands of such a driver, and that the

driver at the time of the occurrence was in the exercise of the usual care and skill of a prudent and skilful driver, then the defendants were not guilty of negligence, and the jury will find for the defendants.

12th. It is incumbent on the plaintiff in actions of this kind to establish to the satisfaction of the jury the negligence of the carrier before he is entitled to recover, and in determining the question of negligence on the part of the defendants the jury should take into their consideration the mode of conveyance, the route trav-
198 elled over, and all the circumstances attending the accident; and if, from all these, the negligence of the defendants is not established the verdit of the jury should be for the defendants.

13th. If the jury believe from the evidence that the accident to the coach at the time plaintiff was injured was not occasioned by any want of competence or skill of the driver or by the use of any horses which prudent stage coachmen of the utmost care and skill would consider unsuitable or unsafe, but was occasioned by the sudden fright of a suitable and safe horse or horses without fault or negligence of the driver, then the jury will find for the defendants.

14th. Contributory negligence is some act or the omission of proper care on the part of the person injured without which the in-
199 juries would not have been received. Passengers, being endowed with reason and intelligence, are bound to the exercise of prudence and care for their own safety. If they fail to exercise such reasonable prudence and care and injuries result the carrier will not be liable.

15th. If the jury believe from the evidence that at the time plaintiff jumped from the coach a reasonable and prudent man in the same situation and circumstances would not have done so, but would have considered it safer to remain in the coach, then the jury will find for the defendants, and in considering whether plaintiff in so jumping from the coach acted as a reasonable and prudent man would have done, the jury will consider all the circumstances in evidence, such as whether or not plaintiff should not have got out of the coach before he did and when other passengers did,
200 the rate of speed at which the coach was moving when he jumped out, plaintiff's condition as to health, strength, activity, and age and all other matters in evidence. What might be reasonable and prudent for one man or under certain circumstances might not be so for another man or under other circumstances. It might be reasonable and prudent for a young, strong, and active man to jump from a coach in motion, and very imprudent and unreasonable under the same circumstances for an old, weak, sick, or inactive man to attempt to do so.

16th. If the jury believe from the evidence that plaintiff contributed to the injury he received by jumping from the coach when a reasonable and prudent man would not have done so, then they will find for the defendants, even if they find that defendants were guilty of negligence in placing the coach in the condition it
201 was in when plaintiff jumped from it.

The rule of law is that, although one party may have

been guilty of negligence, that does not relieve the other party from the obligation of exercising reasonable care and prudence to avoid injury, and if the party injured has contributed to the injury by any negligence on his part he cannot recover.

17th. If the jury find that the plaintiff is entitled to recover any damages in this action, they must give him such damages only as will compensate him for the injuries received. They are not at liberty to guess at the damages or to give speculative damages, nor can they give in this case what are called exemplary or vindictive damages to punish the defendants or to reward the plaintiff.

18th. The jury are to consider only the evidence given in
202 the case and nothing outside of it, and as to the law applicable to the case are to be governed by the instructions of the court.

Fourth. Said instructions, given on the part of plaintiff above set forth, are at variance with those given by the court by defendants' request, as above stated, and calculated, when all said instructions are given together, to confuse and mislead the jury as to the law of the case.

But the court overruled defendants' objections and gave said instructions, and to the overruling of said objection and the giving of said instructions asked by plaintiff and each of them de-
203 fendants, by their counsel, excepted at the time, and this their bill of exception is allowed and signed by the court and filed with the the clerk before the cause is submitted to the jury.

This 16th day of December, A. D. 1882.

WM. J. GALBRAITH, *Judge.*

Thereupon the jury retired to consider upon their verdict, and afterwards came into court and rendered their verdict as follows, to wit:

DEER LODGE CITY, DEER LODGE COUNTY,
MONTANA TERRITORY, *Dec.* 16*th*, 1882.

We, they jurors in or on the trial whare Richard T. Kennon is plaintiff and John T. Gilmer, Monroe Salisbury, and Orange J. Salisbury, defendants, find for the plaintiff and assess his damages the sum of twenty thousand — ($20,000) for general damages *in*, and also the sum of seven hundred and fifty dollars ($750.00) for ex-
204 penses incurred, for medical expenses, and surgical operations.

G. HOLLENBACK,
Foreman.

Thereafter, on the 18th day of December, 1882, defendants filed and served upon the attorneys of plaintiff a notice of a motion for a new trial; which notice was as follows, to wit:

(Court and Title of Cause.)

To the above-named plaintiff:

Take notice that the defendants in the above cause will move the court to vacate and set aside the verdict of the jury rendered in said

cause and to grant a new trial therein on the following grounds, to wit:

1st. Excessive damages appearing to have been given under the influence of passion or prejudice.

2nd. Insufficiency of the evidence to justify the verdict
205 & 206 of the jury, and the same is against law.

3rd. Error in law occurring at the trial and excepted to by the defendants—

First. The court erred in admitting in evidence the depositions of Catherine and Millie C. Goodell.

Second. The court erred in admitting in evidence the deposition of George Piatt and the several interrogatories and answers therein against the objections of defendants.

Third. In giving the fourth, fifth, sixth, seventh, eighth, ninth, and tenth instructions, which the court gave at the instance and request of plaintiff, and which were duly excepted to before said cause was submitted to the jury.

Fourth. The court erred in overruling defendants' motion for a change of venue in said cause. The motion for a new trial will be made upon a statement hereafter to be prepared.

S. DE WOLFE,
W. W. DIXON, AND
A. E. MAYHEW,
Att'ys for Defendants.

207 We hereby acknowledge service of foregoing notice of motion for new trial by copy at Deer Lodge, M. T., this 18th day of December, 1882.

THOS. L. NAPTON &
ROBINSON & STAPLETON,
Att'ys for Pl'ff.

On the same day pl'ff & def'ts entered into a written stipulation concerning the preparation of a statement for a new trial; which stipulation was as follows, to wit:

(Court. Title of Cause.)

In this action it is hereby stipulated and agreed by and between the parties, by their counsel, that the hearing of defendants' motion to set aside and vacate the verdict and to grant a new trial herein (notice of which motion has been this day given) be set for the first day of the next regular term of said court; that defendants have forty days from this date to prepare and serve a draft of state-
208 ment on said motion for new trial; that plaintiff have forty days after service of said draft of statement to prepare and serve amendments thereto if he desires, and that defendants have until the first day of the next regular term of said court to present the statement or statement and amendments to the court or judge for settlement and to have the same settled or certified or agreed to.

It is further stipulated and agreed that defendants, upon complying with such terms as the court may impose, have a stay of all proceedings herein until said motion of defendants for said new trial shall be heard and disposed of. It is also agreed that the terms of this stipulation be entered of record as made by order of court, with consent of parties.

Dated this 18th day of December, 1882, and signed.

THOMAS L. NAPTON,
ROBINSON & STAPLETON,
Att'ys for Pl'ff.

209

S. DE WOLFE,
A. E. MAYHEW, AND
W. W. DIXON,
Att'ys for Def'ts.

S. DE WOLFE,
W. W. DIXON, &
A. E. MAYHEW,
Att'ys for Def'ts.

Defendants assign the following as the ground for a new trial:

1st. Excessive damages appearing to have been given under the influence of passion or prejudice.

2nd. Insufficiency of the evidence to justify the verdict of the jury, and the same is against law.

First. There was no evidence in said cause showing or tending to show that defendants or their agents or employees or any of them were guilty of negligence at the time plaintiff received the injuries complained of.

Second. The evidence shows that the accident to the coach at the time plaintiff jumped therefrom resulted from an unexpected and unforeseen cause, against which the utmost care and prudence
210 on the part of defendants, their agents and employees, could not have guarded or prevented.

Third. The evidence shows that the direct and immediate cause of plaintiff's injuries was from jumping from said coach while it was in rapid motion, and plaintiff thereby contributed to his own injury.

Fourth. The great preponder*um* of the evidence shows that the team driven in said stage at the time of the accident was gentle and well broke and had been driven as stage-horses from two to four years prior to said accident.

Fifth. The evidence shows that the driver was competent and skilful and that he exercised the highest degree of prudence and care at the time of the occurrence of the accident to the coach when plaintiff jumped therefrom.

211 Defendants also assign the following errors at law occur-ing at the trial:

1st. The court erred in overruling defendants' motion for a change of venue.

2nd. The court erred in admitting the deposition of Catherine Goodell to be read in evidence on said trial.

3d. The court erred in admitting the deposition of Millie C. Goodell to be read in evidence on said trial.

4th. The court erred in admitting the deposition of George H. Piatt and the several interrogatories and answers contained therein to be read in evidence on said trial.

5th. The court erred in giving to the jury the 4th, 5th, 6th, 7th, 8th, 9th, and 10th instructions, which it gave at the instance and request of plaintiff.

I hereby certify that the foregoing statement is correct, and the same is hereby allowed.

7th May, 1883.

WM. J. GALBRAITH, *Judge.*

212 And on the eleventh day of May, A. D. 1883, an acknowledgment of service of statement on motion for new trial was filed in said action, and is in the words and figures following, to wit:

(Title of Court and Cause.)

We acknowledge service of statement on motion for new trial in the above cause on the 20th day of January, 1883.

T. L. NAPTON &
ROBINSON & STAPLETON,
Att'ys for Pl'ff.

And afterwards, to wit, on the eighth day of May, A. D. 1883, the following proceedings were had in said action, to wit:

213 At a regular term of the district court of the second judicial district of the Territory of Montana, in and for the county of Deer Lodge, begun and held at the court-house, in the town of Deer Lodge, in said county, on Monday, the seventh day of May, A. D. 1883—present, the Hon. William J. Galbraith, associate justice of the supreme court of the Territory of Montana, assigned to the second judicial district; William Y. Pemberton, Esq., district attorney; James B. McMasters, Esq., sheriff of Deer Lodge county; Reuben L. Davis, clerk—amongst other proceedings the following were had, to wit, on Tuesday, May 8th, 1883:

RICHARD T. KENNON *vs.* JOHN T. GILMER *et al.*

214 Now come counsel for plaintiff and defendant-, and this cause is heard upon defendants' motion for a new trial herein; and the court, having heard the arguments of counsel and being fully advised in the premises, is of the opinion that said motion ought to be, and the same is hereby, overruled; to which said ruling of the court overruling said motion the defendants, by their counsel, then and there excepted; and it is ordered that judgment be entered herein in accordance with the verdict on file in this cause. It is further ordered that all further proceedings in this

cause be stayed for the term of twenty days from this date in order to allow defendants to perfect their appeal herein.

The judgment of said court in said cause is in the words and figures following, to wit:

(Title of Court and Cause.)

215 This action came on regularly for trial. The said parties appeared, by their attorneys, Robinson & Stapleton & Thos. L. Napton, Esq's, counsel for plaintiff, and Hon. S. De Wolfe & W. W. Dixon, Esq., for defendants. A jury of twelve persons was regularly empannelled and sworn to try said action.

Witnesses on the part of plaintiff and defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and say: "We, the jurors in or on the trial wherein Richard T. Kennon is plaintiff and John T. Gilmer, Monroe Salisbury, and Orange J. Salisbury are defendants, find for the plaintiff and assess his damages — the sum of twenty thousand dollars ($20,000) for general damages, and also in the sum of seven hundred and fifty dollars ($750.00) for expenses incurred for medical expenses and surgical operations."

216 Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said Richard T. Kennon have and recover from said John T. Gilmer, Monroe Salisbury, and Orange J. Salisbury the sum of twenty thousand seven hundred and fifty dollars ($20,750.00) damages and plaintiff's cost and disbursements incurred in this action, amounting to the sum of four hundred and fifty-three and $\frac{00}{100}$ dollars.

Judgment entered 9th day of May, 1883.

Attest: REUBEN L. DAVIS, *Clerk.*

Clerk's Office of the District Court of the Second Judicial District of the Territory of Montana in and for the County of Deer Lodge.

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a full, true, and correct copy of the judgment entered in the above-entitled action.

Attest my hand and the seal of said district court this
217 & 218 9th day of May, 1883.

[L. S.] R. L. DAVIS, *Clerk.*

And on May 9th, 1883, a stipulation was filed in said action; which said stipulation is in the words and figures following, to wit:

(Title of Court and Cause.)

It is stipulated by and between the undersigned that the state-

ment on motion for a new trial in said entitled cause shall also be the statement on appeal therein.

Deer Lodge, M. T., May 8th, 1883.

T. L. NAPTON &
ROBINSON & STAPLETON,
Att'ys for Pl'ff.
W. W. DIXON &
S. DE WOLFE, *Att'ys for Def'ts.*

219 On the 21st of May, A. D. 1883, said defandants filed their notice of appeal in the words and figures following, to wit:

(Title of Court and Cause.)

To the clerk of said court and to J. C. Robinson and Thos. L. Napton, attorneys for plaintiff in the above-entitled action:

You are hereby notified that the defendants in the above-entitled action hereby appeal to the supreme court of Montana Territory from the judgment rendered in said district court on the 9th day of May, 1883, in favor of said plaintiff and against said defendants for the sum of twenty thousand seven hundred and fifty dollars damages and four hundred and fifty-three and $\frac{3}{100}$ dollars costs. This appeal is taken from said judgment and the whole thereof,
220 and also from the order of said district court, made on the 8th day of May, 1883, overruling defendants' motion for a new trial in said action.

Dated this 21st day of May, A. D. 1883.

W. W. DIXON AND
S. DE WOLFE,
Att'ys for Def'ts.

We acknowledge service of the foregoing notice of appeal and waive copy thereof, at Deer Lodge, Montana Territory, this 21st day of May, A. D. 1883.

R. L. DAVIS,
Clerk of District Court.
THOS. L. NAPTON &
J. C. ROBINSGN,
Att'ys for Pl't'f.

And on the 23d day of May, A. D. 1883, said defendants filed their undertaking on said appeal in the words and figures following, to wit:

221 In the District Court of the Second Judicial District of Montana Territory in and for the County of Deer Lodge.

RICHARD T. KENNON, Plaintiff,
vs.
JOHN T. GILMER, MONROE SALISBURY, and ORANGE J. SALISBURY, Defendants.

Whereas the defendants in the above-entitled action are about to appeal to the supreme court of Montana Territory from a judgment

rendered in the above-entitled court in the above-entitled action in favor of said plaintiff and against said defendants on the 9th day of May, 1883, for the sum of twenty thousand seven hundred and fifty dollars damages and four hundred and fifty-three and $\frac{00}{100}$ dollars costs of suit:

Now, in consideration of said appeal, we, the undersigned, sureties, residents of said Territory of Montana, do hereby jointly and severally undertake and promise and bind ourselves to said
222 plaintiff that said defendants and appellants will pay all damages and costs which may be awarded against them on said appeal or on a dismissal thereof, not exceeding the sum of three hundred dollars, for which amount we acknowledge ourselves bound to said plaintiff.

And whereas said defendants and appellants are also desirous of staying the execution on said judgment above mentioned on said appeal:

Now, therefore, we, the said sureties, do further, in consideration of the premises and of the stay of execution on said judgment, jointly and severally undertake and promise and acknowledge ourselves bound to the said plaintiff in the further sum of forty-three thousand dollars, that sum being more than double the amount of the said judgment, that if the said judgment appealed from or any part thereof be affirmed or the said appeal be dismissed the said defendants and appellants will pay the amount directed to be
223 paid by the judgment or the part of such amount as to which the judgment is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants upon said appeal.

In witness whereof we have hereunto set our hands this 21st day of May, A. D. 1883.

ANTON M. HOLTER.
JOHN C. CURTIN.

TERRITORY OF MONTANA,
County of Lewis & Clarke, } ss:

Anton M. Holter and John C. Curtin, the sureties who- names are subscribed to the above and foregoing undertaking on appeal, being duly sworn, say, each for himself, that he is a resident of said Territory of Montana, and worth the sum of forty-three thousand three hundred dollars, the amount specified in the foregoing undertaking, over and above his just debts and liabilities, exclusive of property exempt from execution.

224

ANTON M. HOLTER.
JOHN C. CURTIN.

Subscribed and sworn to before me this 21 day of May, A. D. 1883.

[NOTARIAL SEAL.] T. H. KLEINSCHMIDT,
Notary Public.

(Endorsed:) "Approved and filed May 23, 1883. R. L. Davis, clerk."

225 TERRITORY OF MONTANA, } ss.
County of Deer Lodge, }

I, Ruben L. Davis, clerk of the district court of the second judicial district of the Territory of Montana in and for the county of Deer Lodge, do hereby certify that the foregoing transcript on pages "1" to "224" contains a full, true, and correct copy of the second amended complaint, amended answer to second amended complaint, notice of motion for new trial, stipulation as to statement on motion for new trial and as to said motion, motion for new trial, statement on motion for new trial, acknowledgment of service of statement on motion for new trial, stipulation that statement on motion for new trial shall also be statement on appeal, order of court over-
226 ruling motion for new trial, judgment of the court and judgment-roll, notice of appeal, acknowledgement of service of notice of appeal, and undertaking on appeal in a certain action then pending in said court, wherein Richard T. Kennon is plaintiff and John T. Gilmer, Monroe Salisbury, and Grange J. Salisbury are defendants, as therein set forth, as the same appear on file and on record in my office.

Attest my hand and the seal of said court this 20th day of July, A. D. 1883.

{ Seal Second Judicial District Court, Deer Lodge County, Montana Terr. }

REUBEN L. DAVIS, *Clerk.*

227 In Supreme Court of Montana Territory. January Term, 1884.

RICHARD T. KENNON, Respondent,
vs.
JOHN T. GILMER, MONROE SALISBURY, and ORANGE J. SALISBURY, Appellants.

Be it remembered that in the present term of January, A. D. 1884, of this supreme court said cause was brought on to be heard before the court on the transcript of record of the court below in said cause, which was brought here by virtue of an appeal according to law, and was argued by counsel; thereupon the court took the same under advisement.

And afterwards, to wit, in the term of January, A. D. 1885, said cause coming on for the decision and judgment of this supreme court on appeal, the court delivered its opinion herein in the words & figures following, to wit:

227*a* Supreme Court of Montana.

KENNON *v.* GILMER and Others.

Appeal from second district, Deer Lodge county. Filed January 7, 1885.

1. Change of Venue—Montana Statute—"Good Cause Shown."—The conditions and circumstances that render an impartial trial

impossible must come to the knowledge of the court as facts, and not as the opinions and conclusions of the witnesses. The "good cause shown" required by the statute must be a statement of facts upon which the court is to determine whether a sufficient case is made out.

2. Carriers of Passengers—Stage—Fractious Horse—Evidence of Habits of Horse.—In an action for damages growing out of an accident by which a passenger in a stage-coach was injured, the accident being caused, as alleged, by a fractious horse attached to such coach, it is proper for the plaintiff to prove by witnesses the habits of the horse by showing continued instances of a like kind and similar character.
3. Same—Verdict—Appellate Court—Jury—Passion or Prejudice.—In a civil action the appellate court will not disturb the verdict of a jury, if there is evidence to support it, unless the same seems to have been the result of passion or prejudice.
4. Instructions of Court—How to be Taken.—Instructions of a court should be taken as a whole, so long as they are consistent one with another and applicable to the case.

Thos. L. Napton and J. C. Robinson, for respondent.
Stephen De Wolf and W. W. Dixon, for appellants.

WADE, *C. J.*:

This is an action by a passenger against a common carrier of passengers to recover damages for injuries alleged to have been received in consequence of the negligence and carelessness of the common carrier. The complaint in substance alleges that on the thirtieth day of June, 1879, the defendants were common carriers of passengers for hire, by stage-coaches, between the towns of Deer Lodge and Helena, in this Territory; that upon said day the defendants, as such common carriers and in the usual course of their business and for the usual fare, prepaid by plaintiff, received the plaintiff as a passenger in one of their coaches for transportation from Deer Lodge to Helena aforesaid, and undertook to carry him safely on said passage; that in managing and conducting said coach, from its starting point to its place of destination, the defendants were guilty of negligence and carelessness in this, that they failed to provide a suitable, safe, and competent driver and suitable, safe, gentle, and well-broken horses for said coach, which was without the fault of plaintiff, who did not contribute in any way to said carelessness and negligence; that on said day, while the plaintiff was a passenger as aforesaid and being transported as aforesaid, and in consequence of said negligence and carelessness, and by reason of the horses aforesaid being unsafe, unsuitable, and unmanageable, and one of them jumping and
227*b* throwing itself onto the pole of the coach and thereby breaking the same and said team of horses taking fright, the coach was, in consequence thereof, thrown and placed in such a condition of peril as to endanger the life of the plaintiff, and to make it apparently unsafe for him longer to remain on the coach; and he, being actuated by great fear of bodily injury by longer remaining on the coach, jumped therefrom to the ground by reason of the dangerous

position in which the coach was placed by the defendants in consequence of their negligence and carelessness aforesaid; that the plaintiff, in so jumping from the coach, acted as a reasonable and prudent man would have acted under like circumstances, and that he did not contribute to the injury he received and was without fault on his part; that in so jumping from the coach to the ground one of the plaintiff's legs was broken, and that in consequence thereof it became necessary to and his leg was amputated, causing a sickness of three months and an expense of $750. Wherefore the plaintiff prays judgment for the sum of $25,000, besides the expenses aforesaid and costs of suit.

The defendants moved for a change of venue, which motion was overruled and a trial ensued, which resulted in a verdict for plaintiff for the sum of $2,750. Judgment was entered on the verdict, from which, and an order overruling a motion for a new trial, the defendants appeal to this court. The appellants in their briefs and arguments rely for a reversal of the judgment upon the following alleged errors:

(1) The refusal of the court to grant their motion for a change of venue; (2) the admission of incompetent and irrelevant testimony; (3) that the instructions to the jury are contrary to law; (4) that the testimony is insufficient to support any verdict for damages against defendants; (5) that the damages are excessive.

1. Our statute provides that the court may, on good cause shown, change the place of trial when there is reason to believe that an impartial trial cannot be had in the county designated in the complaint. Rev. St., p. 50, § 62. The affidavit upon which the motion for a change of venue was based, made by an agent of the defendants, substantially sets forth that affiant is acquainted with and knows the general sentiments and opinions of the public in reference to this action and the parties thereto, and, from his knowledge of such public opinion, he has reason to believe, and does believe, that the defendants cannot have a fair and impartial trial of this action in the county of Deer Lodge; that the general sentiment of the public in said county is prejudicial to the defendants, so far as this action is concerned; that one trial of the case has already taken place in that county, in which heavy damages were awarded to the plaintiff by the jury that tried the cause; that the verdict and judgment rendered thereon have been generally canvassed in a manner favorable to the plaintiff and unfavorable to defendants, and thereby has produced a general prejudice against defendants.

227c Venue may be changed only for good cause shown. The matter does not rest in the mere discretion of the court. The court has no authority to exercise any other than a judicial discretion. The affidavit must show the cause by a statement of facts. The court must arrive at a conclusion from the facts stated and not from the conclusions of the witness. An affidavit against a whole community that states the mere conclusions of the witness is of no consequence whatever. It ought to state the facts, so that the court and not the witness may determine whether the community is prej-

udiced. The court is to make a finding from the facts. It is to determine in a judicial manner whether an impartial trial may be had. An affidavit which states that the affiant "is acquainted with and knows the general sentiments and opinions of the public in reference to said action and the parties thereto, and from his knowledge of such public opinion affiant has reason to believe, and does believe, that the defendants cannot have a fair and impartial trial of said cause" in the county named, is the mere conclusion of the witness and does not state any facts upon which the court can ascertain the sentiment of the community.

In the case of People *v.* Yoakum, 53 Cal., 567, the court says:

"The conclusion reached on the application must be such as finds warrant in the facts disclosed by the affidavits filed and in the circumstances made to appear in the record."

In the case of People *v.* Congleton, 44 Cal., 95, the court says:

"In this case the affidavits upon which the motion was based were exceedingly unsatisfactory; they in the main set forth merely that, in the opinion and belief of the affiants, the prisoner could not have a fair trial, owing to the popular prejudice against him."

People *v.* Shuler, 28 Call., 495, is to the same effect, and the court says:

"The defendant's affidavit does not establish the fact that the people of the county of Butte were so prejudiced against him as to become disqualified to act as jurors in this case. The statement in this respect was upon information and belief, which, standing alone, no court in the exercise of a proper discretion could regard as of sufficient probative force to authorize a change of the place of trial."

In People *v.* Mahoney, 18 Cal., 186, the court says:

"The mere affidavit of the defendant does not render it obligatory on the court to change the venue. * * * A reasonable discretion is to be given to the court on the subject; and, while we should not be disposed to hold an arbitary refusal to change the venue as warranted, yet we think the mere unsupported assertion of the defendant that he was the victim of a general prejudice in the county is not a conclusive reason for changing the venue, when it is so easy to obtain corroboration of the statement if it were really true."

The correct rule of practice in an application of this character is well stated in People *v.* McCauley, 1 Cal., 383, as follows:

"Affidavits for such a motion must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had. The conclusion is to be drawn by
227*d* the court and not by the defendant and his witnesses, and the court must be satisfied from the facts and circumstances positively sworn to in the affidavits, and not from the general conclusions to which the defendant may swear, or which his witnesses may depose they verily believe to be true."

The fact that one trial had already taken place in the county and that the verdict had been generally canvassed by the public in a manner favorable to the plaintiff and unfavorable to the defendants, whereby, as the witness says, there is a general prejudice against the defendants, is a conclusion by the witness that is not warranted by the facts. In Sloan *v.* Smith, 3 Cal., 413, Mr. Chief Justice Murray says:

"The affidavit states that, owing to certain litigations in which the defendant had been engaged, a prejudice existed against him in the city of San Francisco which would prevent him having a fair and impartial trial. * * * The affidavit on its face was insufficient to warrant the court in changing the venue."

The fact that a jury might be found in a county that answers all the statutory requirements is not at all conclusive upon the question of the existence of such prejudice in the community as to render a fair and impartial trial impossible. This is not the test to be applied to the question, for such a jury might be found when the public sentiment was in a blaze of excitement and passion against one of the parties to the action, and the pressure of this public sentiment might make itself felt during the trial in very many ways upon the jury, upon the witnesses and officers of court, and upon the court itself. Jurors, witnesses, and officers cannot be insensible to a strong and excited public feeling and sentiment concerning the trial that is going on, and are liable to be influenced by it unconsciously and with an honest intention of doing their whole duty. The court-room is a public place, and a trial in which a community is deeply interested brings the people there, and the pressure of their presence and feeling is a strong argument and almost irresistible one way or the other. The influence of their presence and the expression of their interest in the event of the trial in divers ways might give a false coloring to the testimony or warp and bias the judgment in weighing and considering it; and so it is not all of an impartial trial to secure a fair and impartial jury. But the conditions and circumstances surrounding a case that render an impartial trial impossible must come to the knowledge of the court as facts and not as opinions and conclusions of the witnesses. "The good cause shown" required by the statute must be a statement of facts upon which the court is to determine whether a sufficient case is made.

2. It is charged in the complaint that the horses attached to the coach were unsafe and unsuitable and that they became unmanageable, one of them jumping and throwing itself on the pole of the coach, thereby breaking the same, and said team of horses taking fright, etc. Upon the issue presented by these allegation the plaintiff, subject to objection and exception, introduced the testimony of M. C.

227*e* Goodale, which was to the effect that she knew three of the four horses attached to the coach at the time of the accident; that one of them on the lead, called "Buckskin," "would run at the drop of the hat; was bad about shying and quick to start," and that one of the other horses, called "Bitter Root," "was gentle in

the team to handle, but very ferocious when you got him started, and was bad about kicking; that in starting the buckskin horse was very wild and tricky like a young colt; that he was changed around frequently and worked in different places, and that some of the drivers would not drive him at all." Catherine Goodale testified that she knew the buckskin horse used by the defendants on the Deer Lodge road about July 1, 1879; that she saw him shy during fair week of that year; that one afternoon the stage stopped at her house and the horse acted so that the driver could scarcely stop the coach; that he always shied when passing freight wagons near her house; that he would shy so badly that the driver would have to rein the team up to the fence and hold them there; that one day the stage met some pack animals by her house and that this horse acted so badly that the team nearly got away from the driver; that she had seen this horse act in this way very frequently; that she had lived on the road for a long time and had very often seen the horse act as she had said.

On cross-examination the witness stated that it would be impossible for her to count up the times this horse had shied in passing her house, as "he is always at it if he meets a team; that upon one occasion, as she was crossing the road, the horse became so frightened that the driver could scarcely hold him, and that this horse was in the team attached to the coach the day of the accident." George H. Piatt testified that he knew this horse called Buckskin; that in March, 1881, he rode after him and another horse attached to a buggy; that after driving about a mile east of Deer Lodge, and in turning around in a lane towards the buckskin horse, the pole crowded him and he kicked. When he came down he was straddle of the pole, and sat down on it and broke it and then tried to run, and went, probably, 75 feet before he could be stopped; that the driver struck the horse with the whip, when they were turning around in the lane, just before he kicked.

The appellants ably contend that all of this evidence is irrelevant and incompetent, and they cite authorities to the effect that evidence of other specific acts or instances of negligence on the part of the defendants, whose misconduct is alleged, independent of the negligence in question, is not competent because raising a collateral issue. See Shear. & R. Neg., § 191, note; Abb. Tr. Ev., 584–585; First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y., 278; Warner *v.* New York Cent. R. Co., 44 N. Y., 465; Robinson *v.* Fitchburgh R. Co., 7 Gray, 92; Maguire *v.* Middlesex R. Co., 115 Mass., 239; Mississippi C. R. Co. *v.* Miller, 40 Miss.. 45; Sherman *v.* Kortright, 52 Barb., 267; Jacques *v.* Bridgeport R. Co., 41 Conn., 61; Mobile R. Co. *v.* Ashcraft, 227*f* 49 Ala. (N. S.), 305; Fillo *v.* Jones, 2 Abb. Ct. App. Dec., 121; Haynes *v.* Burlington, 38 Vt., 350; Kent *v.* Lincoln, 32 Vt., 591; 1 Whart. Ev., § 40; Bailey *v.* Town of Trumbull, 31 Conn., 581; Eppendorf *v.* Brooklyn City, etc., R. Co., 69 N. Y., 195; Blair *v.* Pelham, 118 Mass., 420; Aldrich *v.* Pelham, 1 Gray, 510; Payne *v.* Lowell, 10 Allen, 147; Baltimore & S. R. Co. *v.* Woodruff, 4 Md., 242; Bedford *v.* Hannibal & St. J. R. Co., 46 Mo., 456; Clemens *v.* Hannibal & St. J. R. Co., 53 Mo., 366; Coale *v.* Hannibal & St. J. R.

Co., 60 Mo., 232. And especially do they insist that the evidence of the witness Piatt, as to the conduct of this horse about 20 months after the accident complained of, is irrelevant and incompetent.

It is very clear, upon principle and authority, that when a party is sued for damages flowing from negligence imputed to him it is irrelevant to prove against him other disconnected though similar negligent acts. 1 Whart. Ev., § 40. To admit such proof would be like attempting to establish the guilt of a defendant on one charge of crime by showing that he was guilty of another and similar crime. But that is not the question. Was the horse in question safe, steady, and suitable for the purpose for which he was used, or was he habitually unsafe and unfit for such use? It has been said that there is no better evidence of negligence than the frequency of accidents, and it might safely be said that there is no better evidence of the unsafe character and habit of a horse than frequent and similar acts of viciousness. The vicious habits of a horse can only be proved by instances. If an accident was caused by the shying of a horse, the fact that he was a shying horse and that he had this habit might be proved by instances before and after the accident in question. If the accident was caused by the horse kicking and breaking the pole proof of like instances before and after the accident would tend in some degree to establish the character of the animal in this regard.

In the case of Todd *v.* Inhabitants of Rowley, 8 Allen, 51, it appeared that the injury was received on the eleventh day of June, 1861. One ground of defense was that the plaintiff was driving an unsafe horse, whose vicious habit of shying contributed to the injury, and the defendants, after introducing evidence tending to prove two instances of the horse shying before the time of the accident, were permitted to show many similar instances afterwards up to March, 1863, about 21 months after the accident complained of.

As to the competency of this proof the court, by Bigelow, C. J., says:

"The objection to the evidence relating to the habits of the horse subsequent to the time of the accident goes to its weight rather than its competency. The habit of an animal is, in its nature, a continuous fact to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent and the result of a fixed habit at the
227*g* time of the accident. Under the limitations prescribed at the trial we think the evidence admissible. Chamberlain *v.* Enfield, 43 N. H., 356."

In the case of Maggi *v.* Cutts, 123 Mass., 535, it appeared in evidence that on the evening of November 19, 1875, at about half past 6 o'clock, the plaintiff was riding in a wagon through Sewell street, which was about 21 feet wide, and there fell or was thrown from his wagon and received the injuries for which he seeks to recover damages; that for a few days previous to the accident and upon said

nineteenth day of November the defendant, whose blacksmith shop was upon Sewell street, had been making an excavation for a cellar under his building and had thrown the dirt, gravel, and loam therefrom into the street, and at the time above named there was a pile of such gravel standing in the street about two and a half feet high, extending ten feet along the street, and from a third to half the distance across the street, the exact dimensions of the pile being in dispute.

The plaintiff introduced evidence to show that, not observing the obstacle and using due care, he had driven his horse upon the pile aforesaid so far that the forward wheels touched or went into it; that the horse had fallen upon the pile and the plaintiff was thrown violently upon the ground; that the horse was helped upon his feet and stood quietly until the plaintiff was put in the wagon. The plaintiff and his witnesses testified to the good character of the horse; but, on cross-examination, testified that the horse had shown signs of kicking, and that on one occasion subsequent to the accident the horse, which was then harnessed to a sleigh, whisked his tail, had gone round, had stopped more than once, and that he found the horse had got his leg over the shaft. The defendant, as one mode of accounting for the accident, contended that the horse might have stumbled or fallen or stopped suddenly without reference to the pile of dirt. Here is a case where the horse at the time of the accident was hitched to a wagon, but there was no evidence of any misconduct of the horse at the accident. There was evidence that the horse had shown signs of kicking and had kicked once about two years before the accident, and that, subsequent to the accident, when hitched to a sleigh, had shown signs of kicking and was found with his leg over the shaft. Lord, J., in deciding the case, said:

"The fact that a horse driven by the plaintiff misbehaved at the time an injury was received, though such misbehavior contributed to the injury, does not necessarily preclude the party from recovering. The misbehavior may have been accidental or from causes for which the plaintiff was under no responsibility. The misbehavior, to bar the plaintiff from recovering, must be either through the fault of the plaintiff or by reason of a vice of the horse for which the plaintiff is in law responsible. Whether or not it is a vice depends largely upon the question whether the misbehavior was only in a single instance or occasional, depending upon other causes, or whether it was the habit of the horse. And, in order to establish the fact that the misbehavior was occasioned by the viciousness of the horse, in has been held to be competent to show that such
227*h* misbehavior is habitual and instances of misbehavior as well after the injury as before have been held competent to prove the habit."

Under these authorities and the principles they enunciate the testimony of the witness Piatt seems to have been competent, though it may have been of little weight; and as to the competency of the two Goodales there can be no doubt. The vicious habit of a horse is a continuous thing and must be established by proving continued instances of a like kind and similar character.

3. Among other instructions to the jury the court gave the following:

"The defendants, as such common carriers of passengers for hire, are not insurers of the life or personal safety of their passengers, but are bound to exercise the highest or greatest degree of precaution and care in every respect in providing for the safety and safe transportation of their passengers while on their coaches."

Objection is made to this instruction for the reason that the words "the highest and greatest degree of precaution and care in every respect" were not so qualified and modified as to have informed the jury that the defendants were bound to exercise the highest and greatest degree of care and skill which prudent men are accustomed to use under similar circumstances. The instructions to a jury must be taken as a whole, and must not contradict or be inconsistent with each other. There is no such thing as plaintiff's or defendant's instructions. The instructions proceed from the court and ought to cover the whole case as made in the testimony. It is not expected that all of the law can be given in one instruction, and so the instructions must be considered as a whole; and if, when so considered, they cover the entire case and no more and make a harmonious whole, not inapplicable or inconsistent with each other, that is sufficient. Further along in the instructions the court defines to the jury what is meant by the expression "the highest and greatest care," or utmost care and prudence, and says:

"The law imposes on the carriers of passengers for hire the utmost prudence and care for the safety of the passengers. By this expression is meant that they must exercise the prudence, skill, and care of a prudent person engaged in the same pursuit. It does not mean that they must, at their peril, adopt every precaution which might by possibility prevent accident or injury, for that would be impracticable and would impose obligations about things that could not be foreseen, and could not, therefore, be guarded against."

Having explicitly defined to the jury the meaning of these words, it was not necessary, when they were used in other instructions, to go over the definition again. In the case of Ryan *v.* Gilmer, 2 Mont., 522, we said:

"They (common carriers) were required to carry appellants from Watson to Helena as safely as human foresight and reasonable care would permit. Carriers of passengers for hire are bound to use the utmost care and diligence in providing safe, sufficient, and suitable coaches, harness, horses, and coachmen in order to prevent those injuries which human care and foresight can guard against.
227*i* Ingalls *v.* Bills, 9 Metc., 1. The proprietor of a stage-coach covenants that he will insure the safe carriage of passengers by the exercise of extraordinary diligence and care, and is responsible for any neglect. Fairchild *v.* California S. Co., 13 Cal., 605. 'Out of special regard for human life and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a carrier of passengers for hire the utmost

care and skill which prudent men are accustomed to use under similar circumstances.' Shear. & R. Neg., § 266, and cases there cited; Story, Bailm., § 601; Ficken *v.* Jones, 28 Cal. 627; Wheaton *v.* North Beach & M. R. Co., 36 Cal., 590; Stokes *v.* Saltonstall, 13 Pet., 181; The Nitro-glycerine Cases, 15 Wall., 537; Ang. Carr., §§ 521–524, 568, and cases cited; Whart. Neg., § 627, note 3; 2 Kent Comm., 601, and notes."

See also Hutch. Carr., 498–502; Indianapolis & St. L. R. Co. *v.* Horst, 93 U. S., 291; Higley *v.* Gilmer, 3 Mont., 90; Boyce *v.* California Stage Co., 25 Cal., 460.

The instructions in this case were fully up to the standard required in the foregoing cases, and were applicable to the case and not contradictory or inconsistent with each other.

4. Is the verdict supported by the evidence, and are the damages excessive? In consequence of the accident and injury the plaintiff lost his foot above the ankle, which is an irreparable injury and for life; but the physicians testify that his life is not likely to be thereby shortened, and the testimony is that his capacity for his occupation (that of book-keeping) is not materially lessened in consequence of the injury. The uncontradicted testimony as to the accident and the cause of it is as follows: On the thirtieth day of June, 1879, the plaintiff, who was a member of the territorial Legislature, in company with six other members and two or three other persons, took passage on one of defendants' stage coaches at the town of Deer Lodge, bound for the town of Helena. When within six or seven miles of their destination, and while the coach was proceeding on its way at a moderate rate of speed, there was met on the road a man on horseback driving before him a pack animal loaded with a camping outfit and a buffalo robe. When the man on horseback and the pack animal were first seen they were within about 300 yards of the coach. There were attached to the coach four horses, the leaders being the buckskin horse and another. The leaders became frightened at the pack animal, but still approached towards it for a short distance and then finally stopped; then the leaders whirled around to the left, and, in doing so, broke the tongue of the coach and undertook to run away. While the horses were running fast the passengers leaped from the coach, the plaintiff being the last to leave it, and in jumping and striking on the ground his leg was broken, and it became necessary to amputate his foot. The coach was not overturned, and the driver stopped the horses within 50 or 75 yards of where the accident occurred.

In a civil case an appellate court will not disturb the verdict of a jury, if there is evidence to support it, unless the same seems
228 to have been the result of passion or prejudice. In this case there is testimony to the effect that the driver, at the time of the accident, was drunk, and that the Buckskin horse was, at the time, unsafe and unfit for the business in which he was used; but the clear weight of the testimony strongly favors the claim of defendants that the driver was entirely sober at the time of the accident; that he was one of the best stage-drivers in the country, and that the buckskin horse was thoroughly well broken and gentle

and suitable to be used on a stage-coach. This being so, it looks as though the injury to the plaintiff was the result of unavoidable accident, and that this large verdict comes from something outside of the testimony. The verdict is too large. We have been unable to find one so great, even where the injury was the result of willful negligence or gross carelessness. In the case of Union Pac. R. Co. *v.* Hand, 7 Kan., 393, the court says:

"Of course, courts are reluctant to interfere with the verdicts of juries on the ground of excessive damages; but to uphold them where a great wrong has been done would, as a precedent, be doing an infinite wrong to the community. The rights of parties are submitted to the unbiased judgment of juries—not to their passions or prejudices—and where it is apparent that these feelings have entered into and influenced their decision it becomes the duty of the court to see that a tribunal organized to secure justice is not perverted from its proper purpose to become the instrument of oppression and injustice."

There is no pretense or claim that the injury was willful or that there was gross negligence, and if the case had been between two strangers, unknown to the jury and tried on this evidence, we feel confident that if there had been a verdict at all for the plaintiff it would have been for a very much less sum. The injury to the plaintiff is permanent, but it does not endanger his health or shorten his life or incapacitate him in his business. The evidence does not support this verdict. We cannot say that there is no evidence to support a verdict for such an amount as the plaintiff ought to recover, and this verdict and the judgment thereon ought to be reduced to that amount.

The judgment is hereby reduced to the sum of $10,750 and affirmed as to that amount.

229 Thereupon judgment on appeal was entered herein as follows, viz:

In Supreme Court of Montana Territory. January Term, 1885.

RICHARD T. KENNON, Respondent,

vs.

JOHN T. GILMER, MONROE SALISBURY, & ORANGE J. SALISBURY, Appellants.

Be it remembered that the above-entitled cause was brought into this supreme court, by virtue of an appeal, agreeably to the statutes of said Territory and the rules of this court in such case made and provided; and in the term of January, 1884, of this court said cause came regularly on to be heard before the court on said appeal, — the same was argued by counsel; thereupon the court took the same under advisement.

And afterwards, in the present term of January, A. D. 1885, said cause came on for the decision and judgment of this court on appeal;

whereupon, on consideration, it is now here ordered and ad-
230 judged by this court that the judgment herein of the court below be, and the same is hereby, reduced to the sum of ten thousand seven hundred and fifty dollars; and affirmed with costs as to that amount; and it is hereby further ordered and adjudged that said respondent, Richard T. Kennon, recover against said appellants, John T. Gilmer, Monroe Salisbury, and Orange J. Salisbury, —— dollars for his costs herein expended, and have execution therefor.

7 January, 1885.

And afterwards, to wit, on the 31st day of January, 1885, said appellants sued out & filed herein a writ of error to remove said cause to the Supreme Court of the United States, of which said writ of error, in words & figures, the following is a copy, to wit:

231 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory, before you or some of you, in a cause between Richard T. Kennon, plaintiff and respondent, and John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, defendants and appellants, a manifest error hath happened, to the great damage of the said John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you that, if judgment be therein given, *that* then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the
232 United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirty-first day of January, in the year of our Lord one thousand eight hundred and eighty-five.

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by—
DECIUS S. WADE,
Chief Justice.

And on the sixth day of February, A. D. 1885, said appellants, now pl'ffs in error, filed herein their citation, which is in the words and figures following, viz:

233 UNITED STATES OF AMERICA, *ss:*

In Supreme Court.

JOHN T. GILMER, ORANGE J. SALISBURY, and MONROE SALISBURY,
Pl'ffs in Error,
vs.
RICHARD T. KENNON, Def't in Error.

To Richard T. Kennon, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of the supreme court of Montana Territory, this 31st day of January, A. D. 1885.

DECIUS S. WADE,
Chief Justice.

I do hereby acknowledge service of the within citation and the delivery to me of a copy thereof on the 4th day of February, A. D. 1885.

ROBINSON & STAPLETON &
THOS. L. NAPTON,
Att'y- for Respondent, Richard T. Kennon.

234 *Bond to Accompany Writ of Error.*

Know all men by these presents that we, Henry Klein and John C. Curtin, are held and firmly bound unto Richard T. Kennon in the full and just sum of twelve thousand ($12,000.00) dollars, to be paid to the said Richard T. Kennon, his certain attorney, executors, administrators, or assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of February, in the year of our Lord 1885.

Whereas lately at a term of the supreme court for the Territory of Montana, in a suit pending in said court between Richard T. Kennon, as plaintiff and respondent, and John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, defendants and appellants, there was rendered a final judgment in favor of the said plaintiff and respondent and against the said defendants and appellants for the sum of ten thousand seven hundred and fifty ($10,750) dollars, exclusive of costs; and the said defendants having sued out a writ of error from the Supreme Court of the United States, directed to the said supreme court of Montana Territory (and lodged a copy thereof in the
235 clerk's office of said last-named court for the inspection of said plaintiff), to remove said cause to the Supreme Court of the

United States to reverse said final judgment in said cause, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of the above obligation is such that if the said defendants shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea and shall pay all costs and damages that shall be awarded against them on and by virtue of the suing out of said writ of error, then this obligation to be void; else to remain in full force and virtue.

HENRY KLEIN. [SEAL.]
JOHN C. CURTIN. [SEAL.]

Sealed & delivered in the presence of—
I. R. ALDEN.

The within undertaking hereby approved and supersedeas ordered this 7th day of February, A. D. 1885.

D. S. WADE,
Chief Justice.

Filed Feb'y 7, 1885.

I. R. ALDEN, *Clerk.*

236 In Supreme Court, Montana Territory.

JOHN T. GILMER, O. J. SALISBURY, & MONROE SALISBURY, Pl'ffs in Error,
vs.
RICHARD T. KENNON, Def't in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing two hundred and thirty-five pages, numbered from 1 to 235, inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled cause as the same appear on file and of record in my office.

Witness my hand & official seal hereunto affixed this 1st day of May, A. D. 1885.

[Seal Supreme Court, Montana Territory.]

ISAAC R. ALDEN, *Clerk.*

237 In the Supreme Court of Montana Territory. January Term, 1885.

RICHARD T. KENNON, Plaintiff in Error,
vs.
JOHN T. GILMER, ORANGE J. SALISBURY, and MONROE SALISBURY, Defendants in Error.

Be it remembered that in the present term of January, A. D. 1885, of this supreme court for the Territory of Montana, in a cause therein pending between Richard T. Kennon, plaintiff and re-

spondent, and John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, defendants and appellants, such proceedings were had therein as that the judgment of the court below entered in said cause and duly appealed from was by the order of this court modified by reducing the amount of said judgment to $10,750.00, the original amount named in said judgment of the court below being $20,750.00 & costs of suit; to which order thus modifying said judg-
238 ment the said respondent, Richard T. Kennon (now plaintiff in error), by his counsel, duly excepted.

And afterwards, to wit, on the first day of May, A. D. 1885, the said plaintiff, Richard T. Kennon, by way of cross-appeal in defendants' proceedings herein by writ of error, sued out a writ of error in his own behalf for the purpose of presenting said cause to the Supreme Court of the United States, that, the proceedings herein being inspected, the said action of this supreme court in modifying said judgment as aforesaid may be corrected and reversed, and a bond for costs to accompany said writ of error, conditioned, executed, and approved as required by law, and a citation directed to said defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States on the second Monday of October next to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected; which said bond is in the words & figures following, viz:

239 Know all men by these presents that we, Samuel E. Larabie and Howard H. Zenor, are held and firmly bound unto John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury in the full and just sum of three hundred dollars, to be paid to the said John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, their certain attorney, executors, administrators, or assigns, jointly and severally, by these presents.

Sealed with our seals and dated this first day of May, A. D. 1885.

Whereas lately at a term of the supreme court for the Territory of Montana, in a suit pending in said court between Richard T. Kennon, as plaintiff and respondent, and John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, as defendants and appellants, there was rendered a final judgment in favor of said Richard T. Kennon and against said defendants for the sum of ten thousand seven hundred and fifty dollars, which said final judgment was a modification of the judgment of the court below in said cause, which was for the sum of $20,750.00; and the said Richard T.
240 Kennon, plaintiff, duly excepting to such modification or reduction of the sum named in the original judgment herein of the court below, has interposed in said cause a cross-appeal from said final judgment to the Supreme Court of the United States, and has sued out a writ of error for that purpose (and lodged a copy thereof in the clerk's office of the supreme court of this Territory for the inspection of said defendants) to remove said cause to the Supreme Court of the United States to vacate and reverse the order of the court modifying the original judgment in said cause as aforesaid, and a citation directed to the said defendants, citing and ad-

monishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute his said writ of error to effect and answer all costs that may be awarded against him by reason of the suing out of said writ of error, then this obligation to be void; else to remain in full force and virtue.

241 SAMUEL E. LARABIE. [SEAL.]
HOWARD H. ZENOR. [SEAL.]

Sealed & delivered in presence of—
HENRY S. REED.

Endorsed: "The form of the foregoing bond and sufficiency of the sureties thereto are hereby approved this 1st day of May, A. D. 1885. (Signed) Decius S. Wade, chief justice M. T. Filed May 1, 1885. I. R. Alden, clerk."

And the said writ of error aforesaid is in the words & figures following, viz:

242 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory, before you or some of you, in a cause between Richard T. Kennon, plaintiff, and John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, defendants, a manifest error hath happened, to the great damage of the said Richard T. Kennon, plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you that, if judgment be therein given, *that* then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at
243 Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of May, in the year of our Lord one thousand eight hundred and eighty-five.

ISAAC R. ALDEN,
Clerk of the Supreme Court of the Territory of Montana.

The foregoing writ allowed.

DECIUS S. WADE,
Chief Justice M. T.

Filed May 1, 1885.

I. R. ALDEN, *Clerk.*

And the said citation, with the endorsements thereon, is in the words and figures following, to wit:

244 UNITED STATES OF AMERICA, *ss:*

In Supreme Court.

RICHARD T. KENNON, Plaintiff in Error,
vs.
JOHN T. GILMER, ORANGE J. SALISBURY, and MONROE SALISBURY, Defendants in Error.

To John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury and Stephen De Wolfe, Esq., and W. W. Dixon, Esq., their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein Richard T. Kennon is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment or order in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

245 Witness Honorable William J. Galbraith, associate justice of the supreme court of Montana Territory, this 6th day of May, 1885.

WM. J. GALBRAITH,
Associate Justice of Montana Territory.

Endorsed: Service of copy of the within accepted this 6th day of May, A. D. 1885. S. De Wolfe and W. W. Dixon att'ys for defendants. Filed May 7, 1885. I. R. Alden, clerk.

246 In the Supreme Court, Montana Territory.

RICHARD T. KENNON, Plaintiff in Error,
vs.
JOHN T. GILMER *et al.*, Defendants in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing nine pages contain a true & correct transcript of the bond, writ of error, and citation and the acknowledgement of service thereof endorsed thereon. I do further certify that the remainder of the record in the above-entitled cause has already been transcribed and transmitted to the clerk of the Supreme Court of the United States, at the instance and request of

the said defendants in error, on the writ of error sued out in this case by them.

In witness whereof I have hereunto set my hand and affixed my official seal this 9th day of May, A. D. 1885.

[Seal Supreme Court, Montana Territory.]

ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 178. Richard T. Kennon, plaintiff in error, *vs.* John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury. Filed October 23, 1885. No. 203. John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury, plaintiffs in error, *vs.* Richard T. Kennon. Filed November 12, 1885.

Supreme Court of the United States,

OCTOBER TERM, 1888.

No. 178.

RICHARD T. KENNON, PLAINTIFF IN ERROR,

vs.

JOHN T. GILMER, ORANGE J. SALISBURY, AND MONROE SALISBURY.

No. 203.

JOHN T. GILMER, ORANGE J. SALISBURY, AND MONROE SALISBURY, PLAINTIFFS IN ERROR,

vs.

RICHARD T. KENNON.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR RICHARD T. KENNON, PLAINTIFF IN ERROR IN NO. 178 AND DEFENDANT IN ERROR IN NO. 203.

I.

STATEMENT OF CASE.

These are cross-writs. Messrs. Gilmer, Salisbury and Company, the defendants in error in the first writ, were, on June

30, 1879, common carriers of passengers for hire by stage-coaches between the town of Deer Lodge and the town of Helena, in the Territory of Montana. On that day, Mr. Richard Kennon, the plaintiff in error in the first writ, at the time a member of the Legislature of the Territory, was, with other members of that body, a passenger in one of these coaches between the towns mentioned. When they were about six miles from Helena, the horses attached to the coach ran away, and the coach was in danger of being overturned and broken to pieces. The passengers all jumped out; and Mr. Kennon, whose position in the coach retained him to the last, followed the others, and also jumped out, having been urged thereto by one of his fellow-passengers, Dr. Mitchell, who called to him to jump to save his life. Under the apprehension that his life was in danger from the runaway horses, Kennon leaped from the carriage. In doing so, he broke his leg near the ankle; and amputation became necessary. He was laid up for several months, suffering great pain in the meantime; and his injuries permanently impaired his health, and disabled him from the attention to business of which he had been previously capable.

The injury was claimed to be the result of negligence on the part of the common carriers, on the ground that their horses were vicious and unsafe, and so known to them; and that the driver was under the influence of liquor at the time, and incompetent to manage the horses.

The plaintiff Kennon sued for damages. The suit was instituted in the county of Deer Lodge; and the damages were laid at the sum of $25,750—$25,000 for the bodily injuries, and $750 for medical attendance and medicine.

There were two trials, the present being the second one The jury rendered a verdict for Mr. Kennon for the sum of $20,750.

The defendants, Gilmer, Salisbury and Company, before the second trial, moved for a change of venue, on the ground of prejudice existing, or alleged to exist, against them in the

county of Deer Lodge. The motion was refused, because the application showed no facts from which the court could infer the existence of any such prejudice. To this ruling an exception was taken.

Testimony was admitted on the trial to show that, both before and after the accident in question here, one of the horses used on this occasion had given indications of a disposition that rendered it unsafe for use. This also was alleged to be error.

It was also claimed that there was error in the instructions given by the court to the jury, it being alleged that they were inconsistent.

Upon these three alleged errors, which were duly embodied in bills of exceptions, the defendants, Gilmer, Salisbury and Company, took the case to the supreme court of the Territory.

In a statement in support of a motion for a new trial, as is authorized by the laws of the Territory, other errors were alleged; as, excessive damages, insufficiency of evidence to justify the verdict, and that the preponderance of evidence was to the effect that there was no negligence on the part of the defendants.

The supreme court of the Territory held that there was no error in the rulings of the trial court; but at the same time reduced the amount of the verdict to $10,750, and affirmed the judgment as to that amount.

The defendants, Gilmer, Salisbury and Company, sued out a writ of error to reverse the judgment against them; and that writ of error stands here as cause No. 203. The plaintiff Kennon, also, took exception in due form to the action of the supreme court of the Territory in reducing the amount of the judgment; and sued out the writ of error, which stands as cause No. 178, to reverse that action so far as it interfered with the amount of the verdict. This was sued out last, but docketed first in this Court.

II.

Assignment of Errors.

So far as cause No. 178 is concerned, the plaintiff in error therein has but one ground of error to assign, to wit:

1. The supreme court of the Territory erred in reducing the amount of the verdict of the jury, and the judgment thereon of the trial court.

So far as cause No. 203 is concerned, it is submitted that there is no error.

III.

Brief of Argument.

1.

It is respectfully submitted that it was error on the part of the supreme court of the Territory to reduce the amount of the verdict of the jury, and the judgment thereon of the lower court, in the manner in which it did.

This action, of course, was based on the ground that the damages awarded by the jury were excessive. We claim that the court was without jurisdiction to take any such action. The right of a trial court to set aside the verdict of a jury on the ground of excessive damages is not to be questioned. But neither the trial court nor any appellate tribunal is authorized or permitted to interfere with that verdict by enlarging or diminishing it. This is well-settled law. It is the rule of the common law, and it is the mandatory requirement of the Constitution of the United States (seventh amendment). If damages are deemed excessive, the trial court, or an appellate tribunal, when the power is vested in it, may set aside the verdict and order a new trial. But that is the whole extent of the power of either. The person in whose favor the verdict is may, of course, remit a part of

it, but a *remittitur* is the voluntary act of the party. The court cannot order it. And the act is not regarded as the less voluntary because it is done, as frequently happens, as the condition of a verdict being permitted to stand.

There is nothing to contravene this position either in the territorial legislation of Montana or in the statutes of the United States affecting that Territory; and it is not apparent, in view of the seventh amendment to the Federal Constitution, that there could be any valid enactment to the contrary.

The power of the territorial courts is defined partly by the statutes of the United States and partly by the enactments of the territorial legislature. Section 1907 of the Revised Statutes of the United States provides that "the judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, *Montana*, and Wyoming shall be vested in a supreme court, district courts, probate courts, and in justices of the peace." And sec. 1866 provides that "the jurisdiction, both appellate and original, of the courts provided for in secs. 1907 and 1908 shall be limited by law."

The limitation by law, so directed to be made, was provided by the territorial legislature, which enacted that "the supreme court shall have appellate jurisdiction in all cases tried in the district courts (Montana Code of Civil Procedure, sec. 697, Compiled Statutes of Montana); and also, that "upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken (sec. 440, Code of Civil Procedure); and, further, that "upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all the parties; and may set aside or confirm or modify any or

all of the proceedings subsequent to or dependent upon such judgment or order." (Sec. 441, Code of Civil Procedure.)

Under these enactments the supreme court of the Territory exercises the power of revision usually restricted to the trial courts; but there is nothing in them to authorize the change of a jury's verdict by enlargement or diminution. The power to *modify*, which is given to it, can have no reference to trials by jury. In Montana, as in most, if not all, of the Territories, common law and equity procedures are blended, and there is but one form of civil action (Code of Civil Procedure, sec. 1); and the power of *modification* given to the appellate tribunal must be confined to such matters as are not committed to the exclusive arbitrament of a jury.

Neither is there anything in the legislative enactments of the Territory giving the trial court any more power over the verdict of a jury than it had at common law. The only provision upon the subject is to be found in sec. 296 of the Code of Civil Procedure, which is as follows: "The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of said party" (and the section proceeds to prescribe the grounds for a new trial, which it is unnecessary to transcribe here).

The conclusion would seem to be unavoidable, that it was error in the supreme court of the Territory to reduce, as it did, the amount of the verdict rendered by the jury; and that, for that reason, its judgment should be reversed, and the cause remanded to it with directions to affirm the judgment of the lower court, without modification or qualification.

It was no justification for the action of the supreme court of the Territory that it believed the damages awarded by the jury to have been excessive. That might have been good ground for the ordering of a new trial, but not for the usurpation of the functions of the jury.

2.

Three grounds of error are alleged in cause No. 203. The first of these, the refusal of the trial court to grant a change of venue, is one that cannot be the subject of review here. It is a matter of discretion in the lower court; and while an abuse of discretion might be alleged as error, no such abuse is alleged or charged here. Under the territorial statutes, the refusal of the trial court to grant the motion is subject to review in the supreme court of the Territory; but that gives no jurisdiction of it to this Court.

McFaul *vs.* Ramsey, 20 How., 523.

Moreover, on general principles and under the authorities cited in the opinion of the supreme court of the Territory and various other authorities, the district court was right. By the law of the Territory, a change of venue in civil actions is authorized, and may be granted by the court, "when there is reason to believe that an impartial trial cannot be had therein"—that is, when the court has reason so to believe, and when facts are brought before it reasonably sufficient to induce such belief. In this case, a general prejudice was alleged to exist against the defendants; but no facts were adduced or stated from which the court could assume or infer the probable truth of the statement. This is insufficient.

See cases cited in opinion of supreme court of Territory, Record, pp. 74, 75.

3.

The only questions, it would seem, that were raised by the defendants at the trial, which can be reviewed here, are those as to the alleged admission of improper testimony, and the alleged error of inconsistency in the instructions given by the court to the jury.

First, as to the question of the admission of improper tes-

timony. The testimony, to which objection is made, consists of three depositions—that of Mrs. Millie C. Goodell (Record, pp. 18, 19, 20); that of Mrs. Catharine Goodell (Record, pp. 19, 20); and that of George H. Piatt (Record, pp. 21–24). And the ground of objection is that these depositions have reference to other acts of viciousness or unfitness on the part of the horse that caused the injury in this case on other occasions, either before or after the accident.

This objection certainly is not applicable to the deposition of Mrs. Millie C. Goodell (Record, pp. 18, 19, 20), which refers exclusively to the time of the accident, and to the conduct of the horse and the driver of the coach at that time, and tends to prove directly that at that time the horse was fractious and vicious, and the driver in a state of intoxication.

The testimony of Mrs. Catharine Goodell is to the same effect; but she also testifies to the vicious conduct of the horse on various previous occasions; and it is alleged that this was inadmissible. Mr. Piatt's testimony had exclusive reference to a manifestation of vicious disposition by the same horse on an occasion subsequent to the accident,—in the month of March, 1881, at the time of the first trial of the case, and about 20 months after the accident; and it was objected that such testimony also was inadmissible.

It is undoubtedly true that proof of one act is not proof of another similar act, and is inadmissible in evidence for any such purpose. But the question at issue here is not whether the horse complained of acted viciously at the moment of the accident on June 30, 1879, and whether other acts of viciousness should be admitted to prove that act. The misconduct of the horse at the time of the accident is not controverted. It is conceded that it ran away and broke the coach. The question is whether this was the result of accident or of viciousness. To show that it was the latter, it is sought to prove that the horse was of vicious disposition, and known to be such by the defendants or their em-

ployés. Now, a vicious disposition can best be proved, in fact can only be proved, by proof of acts of viciousness—just as fraudulent or criminal intent ordinarily can only be proven by proof of acts of fraud or crime. It is not very apparent how it could be done otherwise. And it is even less apparent how the defendants could be charged with knowledge of the vicious character of the animal, otherwise than by the proof of acts of viciousness brought home to their knowledge. The question is not to prove the existence or commission of one vicious act by proof of other vicious acts of a similar character, but to prove the vicious disposition of an animal by the proof of repeated acts of viciousness.

The argument of the supreme court of the Territory on this point is unanswerable; and is amply borne out by the authorities cited in support of it, as well as by the decisions of this Court.

Grand Trunk R. R. Co. *vs.* Richardson, 91 U. S., 454.
Maggi *vs.* Cutts, 123 Mass., 535.
Todd *vs.* Rowley, 8 Allen, 51.
Chamberlain *vs.* Enfield, 43 N. H., 356.
Rosenthal *vs.* Walker, 111 U. S., 185.
Butler *vs.* Watkins, 13 Wallace, 456.
Lincoln *vs.* Claflin, 7 Wallace, 132.

In several of these cases there was proof of subsequent as well as of previous acts of misconduct.

In the case cited of Maggi *vs.* Cutts, 123 Mass., 535, proof of subsequent acts of viciousness of a horse had been excluded by the trial judge; and upon exceptions taken, it was held that this was error. The court said:

"Whether or not it is a vice (of the horse) depends largely upon the question whether the misbehavior was only in a single instance, or occasional, depending upon other causes, or whether it was the habit of the horse. And in order to

establish the fact that the misbehavior was occasioned by the viciousness of the horse, it has been held to be competent to show that such misbehavior is habitual, and instances of misbehavior, as well after the injury as before, have been held competent to prove the habit (Todd *vs.* Rowley, 8 Allen, 51). The limit of time within which such misbehavior may be proved must depend largely upon the discretion of the presiding judge. It is not, however, wholly within such discretion. It is the right of a party to prove such instances immediately before and immediately after; but when instances are offered so remote from the time of the injury as, in the opinion of the presiding judge, to mislead or distract the minds of the jury, he may in his discretion reject the evidence; and if, in the opinion of the court, such evidence was so remote as to be a fit subject for the discretion of the presiding judge, that discretion will not be revised by the (appellate) court. * * * In this case we think the evidence rejected was clearly competent and material, and its sufficiency should have been left to the jury."

This was the unanimous opinion of the court; and the case was reversed, because the testimony as to subsequent acts of viciousness had not been admitted.

In the case of Todd *vs.* Inhabitants of Rowley, 8 Allen, 51, which, like the present, was a case of injury resulting from the viciousness of a shying horse, the parties were permitted at the trial to show many similar instances of viciousness both before and after the accident, even to a period of 21 months afterwards. On review, the supreme court of the State said:

"The objection to the evidence relating to the habits of the horse subsequent to the time of the accident goes to its weight rather than to its competency. The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind. Evidence having been

first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident."

The principle that a negligent habit may be proved by other acts of negligence than the one causing injury is fully sustained by the decision of this Court in the case of the Grand Trunk R. R. Co. *vs.* Richardson, 91 U. S., 454, 470, where numerous cases are cited, both from the English and American reports, several of them involving proof of acts of negligence subsequent to the injury; and an apparently antagonistic rule maintained by some courts is repudiated.

It would seem, therefore, that there was no error in the ruling of the trial court in this regard.

4.

The next objection is that the instructions of the trial court to the jury were inconsistent. And the alleged inconsistency is found in the fact that in the fourth instruction given at the instance of the plaintiff (Record, pp. 53, 59) it was stated that "common carriers of passengers for hire are not insurers of the life or personal safety of their passengers, but are bound to exercise the highest or greatest degree of precaution and care in every respect in providing for the safety and safe transportation of their passengers while on their coaches;" while, in the seventh instruction given at the instance of the defendants (Record, pp. 56, 62), it is said that "the law requires of all common carriers of passengers for hire, and required of defendants in this case in the conveyance of plaintiff, the exercise of the utmost care and skill which prudent men are accustomed to use under similar circumstances." The alleged inconsistency on the part of the court, which is charged as error, is its failure to qualify the

fourth instruction asked by plaintiff with the words—"*which prudent men are accustomed to use under similar circumstances*"—which occur in the seventh instruction asked by the defendants.

But the qualification was, in fact, given at the instance of the plaintiff in the fifth instruction requested on his behalf (Record, pp. 53, 59). So the contention is practically reduced to the question, whether the fifth instruction should not have been combined with the fourth, and the two given as one. This is hypercritical; and it is not law.

This Court has more than once been called upon to repudiate the spirit of criticism which would demand from trial judges the most extreme caution in weighing every word and every sentence in their instructions to juries. It is impossible that absolute truth applicable to all cases should be expressed in every sentence of the charge of a court. What is required is that the whole charge should be so far correct as not to mislead a jury of ordinary intelligence. This Court has said:

"A judgment is not to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence."

Chicago, &c., R. R. Co. *vs.* Whitton, 13 Wallace, 275.
United States *vs.* Tweed, 16 Wall., 504.

Plainly the fourth instruction asked by the plaintiff is qualified by the fifth; and no intelligent jury could have been misled by it.

But even if taken alone, the fourth instruction is fully justified by the expressions of this Court in numerous cases.

In Stokes *vs.* Saltonstall (13 Peters, 181, 191), it is said that the common carrier's contract is to transport his passengers safely, "*as far as human care and foresight can go.*"

And this language was approved in the case of Railroad Co. *vs.* Pollard (22 Wallace, 341); and in the case of the Pennsylvania Railroad Company *vs.* Roy (102 U. S., 451, 456). In this last case it is said:

"These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against *by the exercise upon his part of extraordinary vigilance, aided by the highest skill.*"

Although the common carrier in this case was a railroad company dealing with "the powerful and dangerous agency of steam," yet the rule laid down is general. And the language of these cases is very much stronger than that now under consideration.

5.

It is submitted that the only error in this case was the action of the supreme court of the Territory in arbitrarily reducing the verdict of the jury, and that there is no other error in the record; but that for this the judgment of the supreme court of the Territory should be reversed and the judgment of the district court affirmed.

M. F. Morris,

Attorney for R. T. Kennon, Plaintiff in Error in No. 178, *Defendant in Error in No.* 203.

Office Supreme Court U. S.
FILED,
JAN 24 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 178.

RICHARD T. KENNON, PLAINTIFF IN ERROR,

vs.

JOHN T. GILMER, ORANGE J. SALISBURY, AND MONROE SALISBURY, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the Territory of Montana.

Brief for Defendants in Error.

The defendants in error in this case, are the plaintiffs in error, in No. 203, in the same record, and the case is fully stated in the Brief on their behalf, in the latter case.

It will be seen from the record brought up by these writs of error, that the case came before the Supreme Court of the Territory of Montana, on an appeal by the defendants in error from the judgment of the District Court, rendered May 9th, 1883, on the verdict of the jury, for $20,750, and from the order of the District Court, made on May 8th, 1883, overruling their motion for a new trial on the ground of excessive damages appearing to have been given under the influence of passion or prejudice, and of the insufficiency of the evidence to justify the verdict. (Brief in No. 203, pages 4, 5.)

On that appeal the Court below determined, as the record shows, that the damages were excessive, but instead of reversing the judgment and the order of the District Court, from which the appeal was taken, and directing a new trial, the Court below reduced the verdict and the judgment thereon to $10,750, and entered a judgment in favor of this plaintiff in error and against these defendants in error, affirming the judgment of the District Court for that amount, with costs. (Judgment of Supreme Court on Appeal, Rec., pp. 82, 83.)

The contention, on the part of the plaintiff in error, in this case, is, that the Court below erred in reducing the amount of the verdict, and that, for that reason, its judgment should be reversed, and the cause remanded to it with directions to affirm the judgment of the lower Court without modification or qualification.

It is said in the argument, "it was no justification for the action of the Supreme Court of the Territory that it believed the damages awarded by the jury to have been excessive. That might have been good ground for ordering a new trial, but not for the usurpation of the functions of the jury." (Brief of Plaintiff in Error, p. 6.)

It is respectfully submitted, on behalf of the defendants in error, as maintained in the Brief submitted on their behalf in No. 203, that when the Court below decided, on the appeal, that the damages allowed by the jury were excessive, it was *bound*, by law, to grant a new trial, and that its judgment should be reversed, and the cause remanded to it, with directions to order a new trial in the District Court.

The Court below, under its decision and judgment, as rendered in the case, could not affirm the judgment of the District Court, which, upon the appeal, it pronounced improper and erroneous, as founded upon an excessive and outrageous verdict.

The Court below can do only, what it ought to have done, according to its decision as to the verdict, upon the appeal, namely, reverse the judgment and order of the District Court appealed from, and grant a new trial of the action; and that, it is respectfully submitted, it should be now directed to do by this Court.

It is probable that the Court below modified the judgment appealed from, in the manner shown by the record, under the supposed authority of section 428 of the Montana Code of Civil Procedure of 1879, referred to in the Brief for the plaintiffs in error in No. 203, (page 14,) which is taken from the Practice Act of California; but it appears to be settled, in California, that the Supreme Court, upon appeal from a judgment of an inferior Court and an order of such Court denying a motion for a new trial, cannot find the facts upon the evidence in the record, and must order a new trial where the damages are deemed to be excessive. (Ellis *v.* Jeans, 26 Cal., 268; Carpentier *v.* Gardner, 29 Cal., 164; Hayes *v.* Martin, 45 Cal., 563.)

The Court, in *Carpentier* v. *Gardner*, (29 Cal., 164,) said:

"It is not our province to find the facts upon the evidence in the record, and for this reason a new trial would be necessary if the plaintiff should insist upon damages. The plaintiff offers to remit such portion of the sum as the Court may think proper. The finding does not afford the data for making any apportionment. This could only be done by assuming the functions of a jury, and finding the damages upon the evidence—a duty which is not devolved upon this Court. The entire damages must be remitted, or the judgment reversed and a new trial had. * * * It is, therefore, ordered that the plaintiff have fifteen days within which to file in this Court a release of all damages claimed in this action, and that upon filing such release in due form, the judgment for possession be affirmed; but in default of filing such release, that the judgment of the District Court, and the

order denying a new trial, be reversed, and a new trial granted."

The same principle was stated and applied by the Supreme Court of California in the other cases above cited.

J. Hubley Ashton,
Nath'l Wilson,
of Counsel for Defendants in Error.

IN THE

Supreme Court of the United States.

October Term 1888.

No. 203.

JOHN T. GILMER, ORANGE J. SALISBURY, AND MONROE SALISBURY, PLAINTIFFS IN ERROR.

vs.

RICHARD T. KENNON, DEFENDANT IN ERROR.

In Error to the Supreme Court of the Territory of Montana.

Brief for the Plaintiffs in Error.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Supreme Court of the Territory of Montana, rendered and entered on January 7, 1885, in an action at law brought by Richard T. Kennon (defendant in error here), in the District Court of the second judicial district of that Territory, in and for the county of Deer Lodge, against John T. Gilmer, Orange J. Salisbury, and Monroe Salisbury (plaintiffs in error here), to recover damages for personal injuries sustained by him while a passenger in a stage coach of the defendants between the towns of Deer Lodge and Helena, in June, 1879.

The complaint, in substance, alleged that, on June 30th, 1879, the defendants were common carriers of passengers for hire, by stage coaches, between Deer Lodge and Helena; that, on that day, the defendants received the plaintiff as a passenger in one of their coaches for transportation, and undertook to carry him safely from Deer Lodge to Helena; that in managing and conducting the coach from its starting point to its place of destination, the defendants were guilty of negligence and carelessness in this, that they failed to provide a suitable, safe, and competent driver, and suitable, safe, gentle, and well-broken horses, for the coach; that, on the day named, while the plaintiff was a passenger, as mentioned, and in consequence of such negligence and carelessness, and by reason of the horses being unsafe, unsuitable, and unmanageable, and one of them jumping and throwing himself on the pole of the coach, and thereby breaking the same, and the team of horses taking fright, the coach was thrown and placed in such a condition of peril as to endanger the life of the plaintiff, and to make it apparently unsafe for him longer to remain on the coach; and he, being actuated by great fear of bodily injury by longer remaining on the coach, jumped therefrom to the ground by reason of the dangerous position in which the coach was placed by the defendants, in consequence of their negligence and carelessness; that the plaintiff, in so jumping from the coach, acted as a reasonable and prudent man would have acted under like circumstances, and he did not contribute to the injury he received, and was without fault on his part; that in so jumping from the coach to the ground, one of the plaintiff's legs was broken; that in consequence thereof, his leg was amputated, causing a sickness of three months; that he was hindered from attending to his business, &c., and suffered great bodily and mental pain by reason of the said injury, all of which

to his damage in the sum of $25,000; and that by reason of his sickness and injury, he was compelled to and did expend for medical attendance, surgery, medicine, and nursing, the sum of $750.

The complainant accordingly prayed judgment for the said sum of $25,000, and the said sum of $750, and the costs of suit. (Complaint, Rec., pp. 1–3.)

The defendants, in their answer, denied that they undertook to carry the plaintiff safely from the town of Deer Lodge to Helena otherwise or further than as common carriers of passengers, and without any special contract, the law requiring them to carry all passengers.

The answer traversed the several allegations of the complaint imputing negligence and carelessness to the defendants, on the occasion mentioned, and as to the damages sustained by the plaintiff by reason of the injury, and averred that the plaintiff was guilty of contributory negligence in jumping from the coach at the time of the accident; that his jumping from the coach was negligent and unnecessary on his part; that his jumping was the direct and immediate cause of the injury sustained by him, and without which he would have suffered no injury; and that thereby he negligently caused said injury to himself or contributed thereto directly, and was, therefore, estopped from recovering in the action. (Answer, Rec., pp. 3–5.)

The issues of fact, in the action, were tried in the District Court by a jury in the month of December, 1882. (Rec. p. 7.)

Before a jury had been called, the defendants moved for a change of venue, on the ground that an impartial trial could not be had in the county of Deer Lodge. The Court overruled the motion, and the defendants excepted. (Rec., fol. 25, p. 8.)

The trial proceeded, and on December 16th, 1882, the jury found a verdict for the plaintiff and assessed his damages as follows: the sum of $20,000 for general damages, and also the sum of $750 for expenses incurred, for medical expenses, and surgical operations. (Verdict, Rec. p. 65, folio 204.)

On December 18th, 1882, the defendants filed, and served on the plaintiff, a notice of a motion to vacate and set aside the verdict of the jury, and to grant a new trial, in the case, on the grounds authorized by the statute of the Territory.

The notice stated that the motion for a new trial would be made upon a statement to be prepared for that purpose, and on the same day the parties entered into a written stipulation concerning the preparation of the statement for a new trial. (Notice of motion for a new trial, and stipulation, Rec., pp. 65–67.)

The statement on motion for a new trial was accordingly prepared and filed by the defendants, and the same was certified as correct and allowed by the judge who presided at the trial. (Statement on motion for a new trial, Rec., pp. 7 to 68.)

A written stipulation of the parties was filed in the action, that the statement on motion for a new trial in the cause should also be the statement on appeal therein. (Stipulation, Rec., pp. 69, 70, folio 218.)

The statement, as settled and filed in the case, embodies all the evidence adduced by the parties before the jury, and the bills of exceptions tendered by the defendants and signed by the judge who presided at the trial. (Bills of Exceptions, Rec., pp. 52, 53; also, pp. 59–65.)

The defendants assigned the following as their grounds for a new trial:

1st. Excessive damages appearing to have been given under the influence of passion or prejudice.

2d. Insufficiency of the evidence to justify the verdict of the jury, and the same was against law.

They also assigned certain errors of law occurring at the trial, which are the subjects of the bills of exception in the record. (Rec., pp. 67, 68.)

On May 8th, 1883, the cause was heard by the District Court on the defendants' motion for a new trial, when the Court made and entered an order overruling the said motion, and directing that judgment be entered in accordance with the verdict of the jury. It was further ordered that proceedings be stayed for twenty days in order to allow the defendants to perfect their appeal in the case.

The defendants then and there excepted to the ruling of the Court's overruling their motion for a new trial. (Order of the District Court, overruling the motion for a new trial, and defendants' exception, Rec., p. 68, fol. 214.)

On May 9th, 1883, the District Court entered a judgment in favor of the plaintiff, and against the defendants, upon the verdict of the jury. (Judgment, Rec., p. 69.)

The judgment, after reciting the verdict of the jury, *ipsissimis verbis* (*supra*), ordered and adjudged that the plaintiff, Richard T. Kennon, have and recover from the defendants, John T. Gilmer, Monroe Salisbury, and Orange J. Salisbury, the sum of $20,750 damages, and his costs and disbursements incurred in the action, amounting to the sum of 453\frac{90}{100}$.

On May 21st, 1883, the defendants took an appeal to the Supreme Court of the Territory from the judgment of the District Court, rendered May 9th, 1883, and the whole thereof, and also from the order of the District Court, made on May 8th, 1883, overruling their motion for a new trial in the action. (Appeal, Rec., p. 70.)

The Supreme Court affirmed the rulings of the District Court at the trial, but decided that the evidence in the case did not support the verdict, and that the damages were excessive, and that the verdict, and the judgment thereon, ought to be reduced to the sum of $10,750, and that the judgment should be affirmed as to that amount. (Opinion of Supreme Court, Rec., pp. 72–82, see 5 Montana, 257.)

The Court said:

"Is the verdict supported by the evidence, and are the damages excessive? In consequence of the accident and injury the plaintiff lost his foot above the ankle, which is an irreparable injury and for life; but the physicians testify that his life is not likely to be thereby shortened, and the testimony is that his capacity for his occupation (that of book-keeping) is not materially lessened in consequence of the injury. * * *

"In a civil case an appellate court will not disturb the verdict of a jury, if there is evidence to support it, unless the same seems to have been the result of passion or prejudice. In this case there is testimony to the effect that the driver, at the time of the accident, was drunk, and that the buckskin horse was, at the time, unsafe and unfit for the business in which he was used; but the clear weight of the testimony strongly favors the claim of defendants that the driver was entirely sober at the time of the accident; that he was one of the best stage-drivers in the country, and that the buckskin horse was thoroughly well-broken and gentle, and suitable to be used on a stage-coach. This being so, it looks as though the injury to the plaintiff was the result of unavoidable accident, and that this large verdict comes from something outside of the testimony. The verdict is too large. We have been unable to find one so great, even where the injury was the result of willful negligence or gross carelessness. * * *

"There is no pretense or claim that the injury was willful or that there was gross negligence, and if the case had been between two strangers unknown to the jury, and tried on this evidence, we feel confident that if there had been a verdict at all for the plaintiff it

would have been for a very much less sum. The injury to the plaintiff is permanent, but it does not endanger his health or shorten his life or incapacitate him in his business. The evidence does not support this verdict. We cannot say that there is no evidence to support a verdict for such an amount as the plaintiff ought to recover, and this verdict and the judgment thereon ought to be reduced to that amount.

"The judgment is hereby reduced to the sum of $10,750, and affirmed as to that amount."

On January 7th, 1885, judgment, on the appeal, was rendered and entered, in the cause, by the Supreme Court of the Territory, as follows:

"It is now here ordered and adjudged by this Court that the judgment herein of the Court below be, and the same is hereby, reduced to the sum of ten thousand seven hundred and fifty dollars, ($10,750,) and affirmed, with costs, for that amount; and it is hereby further ordered and adjudged that said respondent, Richard T. Kennon, recover against said appellants, John T. Gilmer, Monroe Salisbury, and Orange J. Salisbury, —— dollars for his costs herein expended, and have execution therefor." (Judgment of the Supreme Court on Appeal, Rec., pp. 82, 83.)

On January 31st, 1885, the respondents and appellants sued out a writ of error to that judgment. (Rec., p. 83.)

On May 1st, 1885, the plaintiff and respondent, Kennon, also sued out a writ of error. (Rec., p. 87.)

There are two bills of exceptions in this record.

The first bill of exceptions is to the decision of the District Court overruling the motion of the defendants, plaintiffs in error here, for a change of venue, and also to the rulings of that Court admitting to be read in evidence for the plaintiff the depositions of Catherine Goodell, Millie C. Goodell, and George H. Piatt, which are in the record. (Rec., pp. 52, 53.)

The second bill of exceptions contains the instruc-

tions given to the jury by the District Court at the request of the plaintiff, the defendant in error, and the exceptions taken thereto by the plaintiffs in error. (Rec., pp. 59–65.)

Assignment of Errors.

I. The Court below having determined, on the appeal taken, in the case, by the plaintiffs in error, that the evidence did not support the verdict, and that the damages awarded by the jury were excessive, should have set aside the verdict and ordered a new trial, and erred in rendering the judgment entered by it on January 7, 1885, affirming, with costs, the judgment of the District Court for $10,750. The Court below had no power to substitute itself for a jury, and upon its re-examination of the facts involved in the issues, and tried by the jury, render a judgment thereon for damages against the defendants in the action. The judgment of the Court below, as rendered in this case, against the plaintiffs in error, on January 7, 1885, was and is, therefore, illegal and void, and consequently erroneous.

II. The Court below, upon the premises of its decision and judgment, in this case, erred in not reversing the decision and order of the District Court, made on May 8, 1883, overruling and denying the motion of the defendants, the plaintiffs in error here, for a new trial, and in not setting aside the verdict and in not granting and ordering a new trial in the case.

III. The Court below, upon the appeal taken by the defendants in the action, the plaintiffs in error here, from the judgment of the District Court, and from the order of that Court overruling their motion for a new trial, erred in not reversing the said judgment and in not reversing the said order, and in not granting and ordering a new trial in this action.

IV. The District Court, on the trial of the cause, erred in admitting in evidence, and allowing to be read to the jury, on the part of the defendant in error, the deposition of George H. Piatt, contained in the record, which was introduced to prove misbehavior of one of the horses attached to the stage, when defendant in error was injured, long after the accident involved in this case. (Rec., p. 52.)

V. The District Court, on the trial of the cause, erred in giving to the jury, at the request of the plaintiff, defendant in error here, the following instruction, to wit:

"The jury, for the purpose of determining the negligence of defendants in causing the injuries complained of, are instructed that the contract of common carriers of passengers is to carry safely, and by this term the testimony in the case must show that the defendants had a competent driver, a safe coach, gentle and safe horses, good and safe harness, and the team properly and safely hitched to the coach or vehicle, and all other acts contributing towards the safety of the passengers. The utmost care and skill which prudent men are accustomed to use under similar circumstances is demanded of defendants by the law in this case. If the driver did anything—if the horses did anything—which caused the injury to plaintiff and it could have been avoided by the utmost care or caution on the part of the driver, then you will find a verdict for plaintiff and assess his damages, unless you further find that plaintiff contributed to the injury received by his own negligence." (Rec., p. 59, fol. 181, 182.)

VI. The District Court, on the trial of the cause, erred in giving to the jury, at the request of the plaintiff, defendant in error here, the following instruction, to wit:

"Said defendants being bound by law to exercise such precaution, care, and diligence in such case as you

have been instructed, then, if you find from the evidence that the meeting of a pack animal with pack and buffalo robe on it started the stage team and caused said coach to be thrown in such a position and situation as to cause plaintiff to jump from said coach and thereby receive the injury complained of, *then* it is for you to consider whether or not the failure of the driver of said coach to stop said coach or to use some precautionary measures against said coach team being frightened by said pack animal, and if you find he did not do so it is for you to find and determine as a question of fact whether or not said failure so to do by said driver was not negligence on his part, and if he was negligent therein defendants are liable and the jury will find for plaintiff." (Rec., pp. 59, 60, fol. 182, 183.)

VII. The District Court, on the trial of the cause, erred in giving to the jury, at the request of the plaintiff, defendant in error here, the following instructions, to wit:

"If the jury find for plaintiff—that is, if they find that he is entitled to recover at all—they will then proceed to assess the damages, and in so doing they will consider two questions as to damages as claimed, to wit, general damages to the extent of $25,000, and special damages to the extent of $750. As to the latter, he is entitled to as much as he has proved to have paid out and expended for medical and surgical treatment, medicine, nursing, and other and all expenses occasioned by reason of said injury, not to exceed $750.

"And as to the former—that is, such general damages claimed, $25,000—in assessing the same the jury will assess the same in such sum as will compensate plaintiff for the injury received, and in doing so may take into consideration his bodily and mental pain and suffering, both taken together, but not his mental pain alone, the inconvenience to him of being deprived of his leg, and loss of time and inconvenience in attending to his business generally, from the time of the injury to the present time, as such, plaintiff may have proved and the jury are satisfied, to a reasonable certainty,

inevitably and necessarily resulted from the original injury." (Rec., pp. 60, 61, fol. 185, 186.)

VIII. The District Court, on the trial of the cause, erred in giving to the jury the instructions numbered 4, 7, 8, and 10, requested by the plaintiff, the defendant in error here. (Rec., pp. 59, 60, 61.)

IX. The District Court erred in overruling the motion of the defendants, the plaintiffs in error here, for a change of venue upon the ground that an impartial trial could not be had in the county of Deer Lodge. (Rec., p. 52.)

Argument for the Plaintiffs in Error.

I.

The First, Second, and Third Assignments of Error.

The first three assignments of error are founded upon, and draw in question the legality and validity of, the action of the Court below in dealing with the verdict and judgment, in the District Court, in the manner adopted by it, in this case, instead of setting aside the verdict and ordering a new trial in the District Court.

It is manifest that when the Court below determined, as it did determine, that the evidence did not support the verdict, and that the damages were excessive, the Court was bound to set the verdict aside, and to grant a new trial, and that it possessed no lawful power to substitute itself for a jury, and upon its re-examination of the facts involved in the issues, and which had been tried by a jury, to render a judgment against the plaintiffs in error for $10,750, or any other sum or amount whatever, as damages, for the injury complained of by the defendant in error in this case.

Upon the premises of the decision of the Court, upon

which its action was based, the plaintiffs in error had the constitutional right to a new trial by a jury; a right they demanded, and did not waive; and that right they were deprived of by the act of the Court, in entering the judgment to which this writ of error is prosecuted.

The second clause of the Seventh Article of Amendment of the Constitution declares that "no fact tried by a jury shall be otherwise examined in any Court of the United States otherwise than according to the common law."

This Court has twice adjudged that this clause "should be read as a substantial and independent clause," and that it is a prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner than according to the *common law*. (Parsons *v.* Bedford, 3 Peters, 447, 448; The Justices *v.* Murray, 9 Wall., 277.)

The only modes known to the common law of England for the re-examination of such facts are by the granting of a new trial, and the award of a *venire facias de novo* for some error of law occurring at the trial.

The judgment in this case was, therefore, illegal and erroneous, erroneous *because* illegal, and as such, we submit, it should be reversed by this Court, with directions to the Court below to order a new trial.

The 6th section of the Act of May 26th, 1864, "*to provide a temporary government for the Territory of Montana*," provides, "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." And section 13 of that act declares, "that the Constitution and laws of the United States which are not locally inapplicable, shall have the same force and effect within

the said Montana Territory as elsewhere within the United States.". (13 Stats., 91.)

Section 1891 of the Revised Statutes of the United States declares as follows:

"The Constitution and laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

This legislation distinctly extends to the Territory of Montana the provisions of the 7th Article of Amendment of the Constitution, which ordain as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the common law."

The Civil Practice Act of the Territory of Montana of 1872, was revised by the Territorial Legislature in 1879, by an act entitled an act "*to arrange the general laws of the Territory of Montana in force on the 21st day of February, 1879*," and, as revised, was amended, in some particulars, by an act of February 23d, 1881, (Revised Statutes of Montana, 1879; act of February 23d, 1881, 12th Sess., 1881, p. 10; see, also, Compiled Statutes of Montana, 15th Sess., 1887.)

Section 241 of the Code of Civil Procedure of 1879, provides that "an issue of fact must be tried by a jury, unless a jury be waived, or a reference ordered by consent of the parties."

That code, as amended by the above act of February 23d, 1881, provides as follows:

Section 284. A new trial is a re-examination of an issue of fact in the same Court, after a trial and decision by a jury, Court, or referee.

Sec. 285. The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of said party:

"*First.* Irregularity in the proceedings of the Court, jury, or adverse party, or any order of the Court, or abuse of discretion, by which either party was prevented from having a fair trial. *Second.* Misconduct of the jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the Court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of any one or more of the jurors. *Third.* Accident or surprise, which ordinary prudence could not have guarded against. *Fourth.* Newly discovered evidence; material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. *Fifth.* Excessive damages appearing to have been given under the influence of passion or prejudice. *Sixth.* Insufficiency of the evidence to justify the verdict, or other decision, or that it is against the law. *Seventh.* Error in law, occurring on the trial, and excepted to by the party making the application."

The Code regulates appeals to the Supreme Court from the District Courts in several sections.

Sec. 431. An appeal may be taken to the Supreme Court from the District Courts in the following cases:

First. From a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts.

Second. From an order granting or refusing a new trial, &c.

Section 428 provides that upon an appeal from a judgment, or order, the Appellate Court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any

or all of the parties; and may set aside, or confirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if necessary or proper, order a new trial.

If the latter section has any application to appeals to the Supreme Court from the District Courts, as authorized by the sections of the Code, specially relating to such appeals, it is, of course, subject, in civil actions at common law, in all respects, to the provisions of the Seventh Amendment of the Constitution, which guarantee to the inhabitants of the Territory the right of trial by a jury in such cases.

Such is the material legislation upon which the question of the legality and validity of the judgment of the Court below, to which this writ of error is directed, is to be determined.

Upon the appeal taken by the plaintiffs in error from the judgment of the District Court, and from its order overruling their motion for a new trial, the Court below had jurisdiction to review the rulings of the District Court at the trial, which were the subject of exceptions by the plaintiffs in error, and it had jurisdiction, and it was bound, also, to review the decision of that Court, overruling, by its order of May 8th, 1883, the motion of the plaintiffs in error for a new trial upon the ground that the damages were excessive, and appeared to have been given under the influence of passion or prejudice, and upon the ground of the insufficiency of the evidence to justify the verdict, and that the verdict was against the law.

The Court below reviewed the decision of the District Court upon the motion for a new trial, and it conclusively decided, as the record shows, that the general damages allowed by the verdict were excessive and the result of passion or prejudice, but, instead of setting

aside the verdict and granting a new trial, the Court reduced the verdict for the general damages to $10,000, and reduced the whole judgment of the District Court to $10,750, and affirmed the judgment for that amount. (Rec., p. 83.)

The Court, in its opinion, as we understand it, expressed the view that the verdict was against the *weight of the evidence*, and that the injury to the defendant in error was the result of *unavoidable accident;* and the Court, upon that view, should have set aside the verdict and ordered a new trial, upon the ground of the insufficiency of the evidence to justify the verdict.

The Court afterwards, in its opinion, said: "*The evidence does not support this verdict.* We cannot say that there is no evidence to support a verdict for such an amount as the plaintiff ought to recover, *and this verdict and the judgment thereon ought to be reduced to that amount. The judgment is hereby reduced to the sum of $10,750, and affirmed as to that amount.*"

The opinion, and the judgment entered by the Court, conclusively show that the Court finally determined, on the appeal from the judgment and the order of the District Court overruling the motion of the plaintiffs in error for a new trial, that the damages allowed by the verdict were excessive, and the result of passion or prejudice, and that the motion for a new trial should have been granted by the District Court.

The Court below, upon that determination of the matter before it, was plainly required by law to reverse the judgment and the order of the District Court overruling the motion for a new trial, and to direct that the case be tried again in the District Court; and it had power to do nothing else; and the judgment rendered by it, upon no verdict of a jury, against these plaintiffs in error, for damages, was necessarily illegal and erroneous.

The judgment was error because the power to render it did not exist. (*Ex-parte* Lange, 18 Wall., 175, 176.)

Under the Seventh Amendment of the Constitution, the Court might grant a new trial by a re-examination of the facts tried by the jury, but it had no power to perform the functions of a jury, and, upon its conclusions of fact, from the evidence before the jury, which had tried the case, render a judgment for damages against the defendants, in the action, and no statute of the Territory could confer such a power.

The act of the Court, in this case, therefore, was a plain violation of the second clause of the Amendment, and a direct infringement of the rights guaranteed to the plaintiffs in error by the Constitution.

The trial by jury in the Courts of the United States, as secured by the Seventh Article of Amendment to the Constitution, has always been guarded by this Court with jealousy; and it has never hesitated to set aside a judgment rendered in violation of the provisions of that Amendment, which it had power to review upon writ of error.

It was early decided that a Circuit Court had no power to order a peremptory nonsuit, as the plaintiff had a constitutional right to a trial by a jury, and to have the case submitted to them. (Elmore *v.* Grymes, 1 Pet., 471.)

In *Webster* v. *Reid*, (11 How., 460,) the Court reversed a judgment of the Supreme Court of the Territory of Iowa, in a civil action at law, under a statute of the Territory which prohibited the trial by jury in matters of fact on which the suit was founded.

In *Hodges* v. *Eaton*, (106 U. S., 412), the Court reversed a judgment which recited that it was rendered

"upon the special verdict of the jury, and facts conceded or not disputed upon the trial."

Mr. Justice Harlan, speaking for the Court, said:

"The Court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder without a waiver by the defendant of a verdict by the jury. It has been often said by this Court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently every presumption should be indulged against its waiver. For these reasons the judgment must be reversed."

In *Baylis* v. *Insurance Co.* (113 U. S., 320), the Court below ordered a verdict for the plaintiff, subject to its opinion, whether the facts proved were sufficient to render defendant liable, and judgment was rendered for defendant, upon an opinion of the Court as to the effect of the evidence, and as to the law on the facts as deduced from it by the Court. The Court held that the plaintiff was thereby deprived of his right of trial by jury, and reversed the judgment.

Mr. Justice Matthews, delivering the opinion of the Court said:

"But without a waiver of the right of trial by jury, by consent of parties, the Court errs if it substitutes itself for the jury, and passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon. That is what was done in the present case. It may be that the conclusions of fact reached and stated by the Court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the Court, in entering a judgment against him on its own

view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned."

The decisions of this Court thus condemn this judgment as rendered without constitutional sanction.

There is no precedent for the action of the Court below, in this case, in the practice in California under the Code of Civil Procedure, in force in that State, from which the Montana Civil Practice Act is derived.

The California Code (sec. 53) authorizes the Supreme Court to modify the judgment or order of an inferior Court before it on appeal; but the Supreme Court of California has often decided that it cannot direct a modification of a judgment, in a common law case, upon mere evidence, and that to enable it to do so, the facts must be established by findings, or by admissions in the pleadings. (Ellis *v.* Jeans, 26 Cal., 268; Carpentier *v.* Gardner, 29 Cal., 164: Hayes *v.* Martin, 45 Cal., 563.)

III.

The Fourth Assignment of Error.

The fourth assignment of error is to the decision of the District Court, on the trial, overruling the objections of the plaintiffs in error to the reading of the deposition of one George H. Piatt, and permitting the deposition to be read in evidence to the jury, on behalf of the defendant in error.

The deposition of this witness is found in the statement on appeal, in the record. (Rec., pp. 21–24.)

The bill of exceptions states that the defendants objected to the reading of this deposition and the several interrogatories and answers contained therein, on the ground that they were immaterial and irrelevant, but the Court overruled the objections and admitted the

deposition and the several interrogatories and answers contained therein to be read in evidence to the jury; to which order of the Court overruling such objections and admitting the deposition to be read in evidence, the defendants excepted. (Bill of Exceptions, Rec., p. 52, fol. 158.)

The testimony of Piatt, contained in this deposition, was offered to prove that one of the horses attached to the stage-coach at the time the defendant in error was injured, called "Buckskin," kicked and tried to run away when hitched to a buggy, on a certain occasion, about twenty months *after* the accident in question in this case.

It was apparently introduced solely as make-weight, and no doubt had the intended effect upon the minds of the jury.

The material part of the testimony of this witness, as contained in his deposition, was as follows:

"Q. State whether you know a horse by the name of and known as 'Buckskin,' formerly owned by said Gilmer and Salisbury, and worked by them between the points named in the preceding question.

"A. Yes.

"Q. If you saw that horse in Deer Lodge, Montana, during the year 1881, state about what time, and under what circumstances you saw him."

(Objected to by counsel for defendants as irrelevant and incompetent.)

"A. I saw the horse in Deer Lodge in March, 1881, at the time of the trial between Kennon—Gilmer *et al.* Myself and Mr. Davis were in the hotel. He asked me to ride with him. He brought around the horse and another one, hitched to a buggy. I got in the buggy. He drove out about a mile east of Deer Lodge. In turning in the lane towards the buckskin horse the pole crowded him and he kicked. When he came down he was straddle of the pole, and sat down on it and broke it in two. He then tried to run, and went

probably seventy-five feet before Mr. Davis could stop him. I jumped out and held them by the heads until Mr. Davis got out and helped me to unhitch them. We then spliced the pole, hitched them onto the buggy again, and drove back into town.

(Objected to as incompetent, irrelevant, and immaterial.)

"Q. Which horse did the kicking and caused the breakdown?

"A. The buckskin."

(Question and answer objected to as incompetent.)

Cross-examined:

"Q. State, if you remember, whether Davis did not strike the horse with the whip when they turned around in the lane just before the kicking."

(Objected to by defendant's counsel as incompetent and immaterial.)

"A. As I remember it, he did; I guess I could answer that—yes.

"Q. Do you know at that time whether the horse was being used or whether he had been standing in the stable for some time and was taken out for exercise?"

(Objected to as immaterial by plaintiff's counsel.)

"A. He was taken out for exercise. Mr. Biddle asked Mr. Davis to drive him out for exercise."

(Answer objected to as being hearsay.)

"Q. What would be the effect on a horse of keeping him up in a stable and not using him for some time?"

(Objected to as being incompetent by plaintiff's counsel.)

"A. It would have the effect of making him frisky and playful.

"Q. How long have you been engaged in your present business, and are you familiar with the habits and actions of horses?

"A. Nearly nine years. I am.

"Q. State, in your opinion, whether there was anything in the action of that horse on that occasion to

indicate that he was not and could not be a good and safe horse to use upon a" ——

(Objected to as incompetent.)

"A. I would consider him a safe horse any place with a driver holding the lines. I did not consider that the horse did anything but what any high-lifed, mettlesome horse would have done under the circumstances.

"Q. Do you know that the horse at any time before or since ever made any similar exhibition?"

(Objected to as immaterial.)

"A. No, sir; I, of course, heard of the accident."

This evidence, we submit, was irrelevant and incompetent, and had a manifest tendency to excite prejudice against the plaintiffs in error, as no doubt it did.

A habit is something which is acquired, and when acquired may be presumed to continue; but, *presumptions never run backwards*, and, especially, in a case like the present, where the alleged vicious habit of the animal may have been the result of the accident in question.

Evidence as to instances of a horse misbehaving, prior to the time of a particular accident, due to his misbehavior, may be competent in order to enable the jury to judge whether the defendants, in view of what had previously occurred, exercised proper care, at the time in question; but, obviously, no subsequent instances of the horse misbehaving could have put the defendants on their guard against his misbehaving at time of the accident in controversy, and, therefore, evidence of subsequent instances of misbehavior of the animal would plainly seem to be inadmissible in such a case as the present.

The Supreme Court of Rhode Island, in an action against a railroad company for the burning of the plaintiff's property by sparks from their locomotive,

held, upon similar reasoning, that, while evidence that fires, on the line of the road, had originated from sparks escaping from defendant's engines before the occurrence of the fire in question was admissible, testimony relating to fires of a *later* date should be carefully excluded from the jury as being irrelevant, and as having a manifest tendency to excite prejudice against the defendants. (Smith *v.* R. R. Co., 10 R. I., 22.)

III.

The Fifth Assignment of Error.

This assignment of error relates to the fifth instruction given to the jury at the instance of the defendant in error, which was excepted to by the plaintiffs in error at the trial. (Rec., p. 59, fol. 181.)

This instruction is set out at length in the assignments of error (*supra*), and it will be seen that the District Court told the jury that for the purpose of "determining the *negligence of defendants in causing the injury complained of*, the *contract* of common carriers of passengers is to carry *safely*, and by this term *the testimony in the case must show that the defendants had a competent driver, a safe coach, gentle and safe horses, good and safe harness, and all other acts contributing towards the safety of the passengers.*" The instruction then went on to say that "if the driver did anything—if the horses did anything—which caused the injury to plaintiff, and it could have been avoided by the utmost care or caution on the part of the driver, then you will find a verdict for the plaintiff and assess his damages, unless you further find that plaintiff contributed to the injury received by his own negligence."

The jury, we suppose, must have understood from this that unless the testimony adduced by the defend-

ants showed affirmatively that they had (1) a competent driver, (2) a safe coach, (3) gentle and safe horses, (4) good and safe harness, (5) a team properly and safely hitched to the coach, and (6) all other things contributing to the safety of the passengers, the jury were to find for the plaintiff, unless they believed he contributed to his injury by his own negligence.

The effect of the instruction plainly was to lead the jury to believe, not that the plaintiff was to prove negligence on the part of the defendants, but that the defendants were bound to disprove their alleged negligence by showing that they had each and all of the things mentioned in the charge as necessary and proper for the safety of the passengers.

IV.

The Sixth Assignment of Error.

This assignment of error is based upon the sixth instruction given to the jury, by the trial Court, at the instance of the defendant in error. (Rec., p. 59, fol. 182.)

The jury were told, as we understand the instruction, that if they found that the meeting of a pack animal, with pack and buffalo robe on it, started the stage team, and it caused the stage to be thrown in such a position and situation as to "*cause plaintiff to jump from the coach, and thereby receive the injury complained of*," the defendants were liable, and the jury must find for the plaintiff, if the driver was negligent in not stopping the coach, or in not using some precautionary measures against the coach team being frightened by the pack animal.

This was a peremptory instruction to the jury to find for the plaintiff if the failure of the driver to stop the coach, or to prevent the team from being frightened by the pack animal, was negligence, on his part, and the meeting of the pack animal placed the coach in such a position and situation "as to cause the plaintiff to jump from the coach and thereby receive the injury complained of."

There could be no recovery, of course, by the plaintiff, notwithstanding the negligence of the driver, if the plaintiff had not, at the time he leaped from the stage, a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing the horses; and the jury should have been so told by the Court.

If the plaintiff's act resulted from a rash apprehension of danger, which really did not exist, and the injury which he sustained was to be attributed to his rashness and imprudence, in jumping from the stage, he was not entitled to recover. (Stokes *v.* Saltonstall, 13 Pet., 181.)

The question of the character of the act of the plaintiff, in making the dangerous leap, which broke his leg, as prudent, or rash, under the circumstances, was not presented by this instruction, which was not a proper or correct statement of the law governing the liability of the defendants.

V.

The Seventh Assignment of Error.

This assignment of error relates to the instruction of the District Court on the measure of damages, which told the jury, as will be perceived, that in assessing the general damages they might take into consideration the plaintiff's "bodily and *mental* pain and suffering, both taken together, but not his mental pain alone." (Rec., p. 60, fol. 186.)

This, we submit, was error. Professor Greenleaf lays down the true rule when he says, with respect to injuries to the person, that the jury, in the estimation of damages, are to consider the direct expenditures incurred by the plaintiff, the loss of his time, his bodily sufferings, and, if the injury was *willful*, his mental agony also. (2 Greenleaf, Evidence, § 267.)

The Supreme Court of Illinois seems to have adopted this doctrine, and has expressly held that in a suit for a personal injury, caused by the employment of an incompetent servant, mental suffering of the plaintiff is not a distinct element of damage, in addition to bodily suffering. (Joch *v.* Dankwardt, 85 Ill., 331; Ill. Cent. R. R. Co. *v.* Sutton, 53 Ill., 399.)

This Court, speaking by Mr. Justice Gray, in the case of *Vicksburg, &c., Railroad Co.* v. *Putnam* (118 U. S., 554), has carefully formulated the rule of damages in an action for a personal injury; but we do not perceive that the rule stated, in that case, sanctions the idea that, in a case of ordinary negligence, the jury are entitled to give damages for the metaphysical and sentimental thing called mental suffering.

When a jury, in such a case, are instructed that they may allow damages for the mental suffering, besides damages for the bodily pain, due to the injury, what they are really permitted to do is to award damages twice for the same cause of action, and, in fact, to give exemplary damages where compensatory damages alone are recoverable.

Under the license given to the jury by the trial court it is not surprising that their verdict was excessive and outrageous.

VI.

The Eighth Assignment of Error.

The fourth, seventh, eighth, and tenth instructions given to the jury, by request of defendant in error, were repugnant to, and in conflict with, the several instructions, upon the same matters, which the District Court gave to the jury at the instance of the plaintiffs in error. (Instructions, defendant in error, Rec., pp. 59, 60; plaintiffs in error, Rec., pp. 61–65.)

The plaintiffs in error expressly excepted to them, at the trial, upon that ground. (Rec., p. 61.)

The instructions referred to, given at the request of the defendant in error, and the instructions given at the request of the plaintiffs in error, delivered as they were together, in the manner shown by the record, were manifestly calculated to confuse and mislead the jury, and that they did so is apparent from the character of the verdict in the case.

The cause was evidently not fairly or properly submitted to the jury by the trial court.

VII.

The Ninth Assignment of Error.

This is to the action of the District Court in overruling the motion of the plaintiffs in error for a change of the place of trial, to which they duly excepted. (Rec., p. 52.)

The statute provides that the Court may, on good cause shown, change the place of trial, when there is reason to believe that an impartial trial cannot be had in the county designated in the complaint. (Rev. Stats. Montana, sec. 62.)

The affidavit, on which this motion was based, was